# United States Court of Appeals for the Second Circuit



# APPELLEE'S SUPPLEMENTAL BRIEF

# 76-6107

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VERNICE DUBOSE, et al.,
Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,
Defendants-Appellants.

CLAUDIA WALTER, et al.,
Plaintiffs-Appellees,

v.

CARLA HILLS, et al.,
Defendants-Appellants.

JANETTE LITTLE, et al.,
Plaintiffs-Appellees

v.

CARLA HILLS, et al.,
Defendants-Appellant

FILED PLANT OF APPLE AND STREET OF THE SECOND CURCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENT TO BRIEF FOR PLAINTIFFS-APPELLEES

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EXHIBIT A

UNITED CTALES DISTRICT GUCKY
FOR THE DISTRICT OF COLUMNYA

MYRNA UNDERWOOD, et al.,

Plaintiffs,

v.

Civil Action No. 76-0469

CARIA A. HILLS, et al.

Defendarts.

JUN - 8 1376

AMENDED CLASS CERTIFICATION ORDER DAMES E. DAVIN, Cloth

It having come to the attention of the Court that the Rescribe M. Joseph Blumenfeld, United States District Court for the District of Connecticut, certified a state-wide class in the combined cases of <u>Dubose v Hills</u>, Civil No. H-75-303, <u>Walter v Hills</u>, Civil No. H-75-345, and <u>Little v Hills</u>, Civil No. H-79-346, on May 27, 1976, and it appearing that these cases were filed several months prior to the instant case and have progressed through 1 number of class of litigation, and it further appearing that the exception of this state-wide class from the national class is uncontested by the plaintiffs herein, it is this <u>Table</u> day of Jane, 1976,

ORDERED, that the members of the state-wide class in the abovenamed cases be, and hereby are, exempt from the nationwhide class certified herein on May 21, 1976.

United States District Judge

EXHIBIT B

FILED

SEP 27 4 21 PH '76

U.S. DISTRICT COURT HARTFOED, CONN.

#### UNITED STATES DISTRICT COURT

#### DISTRICT OF CONNECTICUT

VERNICE DUBOSE, ET AL

CIVIL NO. H-75-303

CARLA HILLS, ET AL

CLAUDIA WALTER, ET AL

v.

v.

CIVIL NO. H-75-345

CARLA HILLS, ET AL

JANETTE LITTLE, ET AL .

\_\_\_\_\_

CIVIL NO. H-75-346

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D. 11288.148

CARLA HILLS, ET AL

# RULING ON MOTION TO VACATE ORDER AND DISSOLVE PRELIMINARY INJUNCTION

These lawsuits, consolidated for trial, concern the refusal of the Department of Housing and Urban Development ("HUD") and its Secretary, Carla Hills, to implement an operating cost subsidy program, enacted as Section 12 of the Housing and Community Development Act of 1974. 1/ On

This section amended Section 236 of the National Housing Act, 12 U.S.C. § 1715z-1 (Supp. IV, 1974) amending 12 U.S.C. § 1715z-1 (1970). The program provides for the payment of operating subsidies to certain housing projects assisted under Section 236 and may be found at 12 U.S.C. § 1715z-1 (f)(3) and (g) (Supp. IV, 1974). See notes 5 and 6 infra.

December 15, 1975, this court entered a preliminary injunction ordering the implementation of the program. 2/ On May 27, 1976, the December order was expanded by a ruling converting plaintiffs' original individual classes, which were certified by project, into a statewide class. 3/ The original compliance date of June 1, 1976, has been extended until September 15, 1976, by several orders of this court.

On August 9, 1976, Congress enacted the "Housing and Urban Development and Independent Agencies Appropriation Act," Public Law 94-378. $\frac{4}{}$  Arguing that the proviso contained in

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following sums are appropriated, for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes, namely:

#### HOUSING PAYMENTS

\* \* \* \* \*

For the payment of annual contributions, not otherwise provided for, in accordance with section 5 of the United States Housing Act of 1937, as amended (42 U.S.C. 1437c); for payments

<sup>405</sup> F. Supp. 1277 (D. Conn. 1975). That opinion contains a more exhaustive treatment of the factual background and statutory scheme involved in these actions.

<sup>3/</sup>On May 20, 1976, a similar nationwide class was certified by Judge Pratt in <u>Underwood v. Hills</u>, Civil No. 76-0469. However, that class was amended to exclude the Connecticut statewide class on June 7, 1976.

<sup>4/</sup> Pub. L. No. 94-378 (Aug. 9, 1976) provides in relevant part:

this legislation sheds new light on the issues in this case, the defendants now move to vacate the December and May orders and to dissolve the preliminary injunction. Oral argument was heard on this motion on September 13, 1976.

The Section 236 operating subsidies program is established by 12 U.S.C. § 1715z-1 (f)(3) (1970) (Supp. IV). A

#### 4/ cont'd

authorized by title IV of the Housing Act of 1950, as amended (12 U.S.C. 1749 et seq.); for rent supplement payments authorized by section 101 of the Housing and Urban Development Act of 1965, as amended (12 U.S.C. 1701s); for payments as authorized by sections 235 and 236, of the National Housing Act, as amended (12 U.S.C. 1715z, 1715z-1); and for payments as authorized by section 802 of the Housing and Community Development Act of 1974 (88 Stat. 633), \$2,975,000,000: Provided, That excess rental charges credited to the Secretary in accordance with section 236(g) of the National Housing Act, as amended, shall be available, in addition to amounts appropriated herein, for the payments on contracts entered into pursuant to the authorities enumerated above." (Emphasis added to proviso).

#### 5/ 12 U.S.C. § 1715z-1 (f)(3) provides:

"For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum,

source of funds for these operating subsidies is provided by subsection (g) of the same statute which establishes a "reserve fund" comprised of "excess rentals" collected by the Section 236 project owners. The central issue throughout

#### 5/ cont'd

or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community."

## 6/ 12 U.S.C. § 1715z-1 (g) provides:

"The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974.

this litigation has been the nature and scope of the Secretary's discretion with respect to the implementation of the operating subsidies program and the expenditure of the reserve fund. The issuance of the preliminary injunction was premised upon this court's conclusion that the implementation of the program and the expenditure of the reserve fund for operating subsidies was mandated by the statute.

The defendants now contend that Public Law 94-378 affects my earlier determinations in two ways. First, they argue that this statute "makes it plain that contract authority is required before any of the amounts contained in the reserve fund may be utilized."

Secondly, the defendants assert that the recent act entirely transforms the function of the reserve fund by making it available for a variety of programs other than operating subsidies. The essence of both arguments is that the proviso indicates that the Secretary has discretion to refrain from implementing the operating subsidies program and hence affords a basis for vacating the December and May orders and dissolving the preliminary injunction.

#### I. Contract Authority

The defendants' first contention is a renewal of an argument presented at the time of the December ruling. The Secretary's position is that she requires "contract authority"

Federal Defendants' Memorandum in Support of Motion To Vacate Order and Dissolve Preliminary Injunction ("Memo in Support") at 4.

before she may implement the operating subsidies program; that the existing contract authority is limited in amount and is insufficient to fund all the programs established by Section 236; that she possesses the discretion to allocate the existing contract authority among the several 236 housing programs; and that she has reasonably concluded to allocate the existing contract authority to other 236 programs instead of the operating subsidies program. 8/

The premise of this argument is that the reserve fund can be spent only pursuant to contract. In my earlier consideration of this issue, I reviewed the statutory language and the legislative history and concluded that "direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the Secretary's available contract authority."—

However, the defendants now argue that the proviso of Public Law 94-378, which states that the reserve fund shall be available "for the payments on contracts entered into pursuant to the authorities enumerated above," supports their position that the reserve fund can only be spent pursuant to contract authority.

Memo in Support, at 2.

<sup>9/
405</sup> F. Supp. at 1287 & n.46. This conclusion was based in part upon the language of (f)(3) which authorizes the Secretary "to make, and contract to make, additional assistance payments." (emphasis added), and in part on the availability of resources in the reserve fund established by (g).

The defendants place too much weight upon the proviso's reference to contracts. The language merely recognizes that many of the programs enumerated in Public Law 94-378, including interest reduction payments under the Section 236 program, do require the obligation of contract authority prior to the expenditure of appropriations. However, I conclude that the proviso does not indicate that the reserve fund can only be spent pursuant to contract.

There is a second response to the defendants' contract authority argument. In Part IV of the December opinion, I dealt with the possibility that the reserve fund can be spent only pursuant to contract and that the disbursements are subject to the Secretary's allocation of contract authority.

While I recognized that such a construction would give the Secretary some discretion, I held that a decision not to implement the program would be contrary to Congressional intent and would constitute an unreasonable exercise of that discretion. Thus, even if the proviso did indicate that the reserve fund can only be spent pursuant to contract, this would not provide a basis for vacating the earlier orders or for dissolving the preliminary injunction.

#### II. Transformation of the Reserve Fund

An important factor underlying the December ruling was the special funding method for the operating subsidies program.

<sup>10/</sup> 405 F. Supp. at 1288-92.

At that time, the reserve fund established by subsection (g) was to be used solely for additional assistance payments under the program. The defendants now argue that the proviso in Public Law 94-378 transforms the function of this reserve fund by giving the Secretary authority to utilize it for a variety of enumerated programs. The contention is that Congress' failure to establish priorities concerning the expenditure of the fund indicates that the Secretary has discretion over its allocation and, therefore, that she is no longer under a mandatory duty to make additional assistance payments directly from the reserve fund. This argument necessitates a study of the legislative intent behind the proviso.

In June 1976, the House Appropriations Committee proposed an appropriation of \$2,975,000,000 for payments for subsidized housing programs. This sum was \$95,000,000 less than the budget request. The reduction was based in part on the making available of the money in the reserve fund for a variety of programs other than the operating subsidies program of Section 236. This intent was manifested in the proviso of Public Law 94-378.

In the Senate, Senator Sparkman introduced an amendment which deleted the proviso. In support of this deletion, he stated:

"[T]he Housing Act of 1974 specifically authorized that section 236 funds returned to HUD as

<sup>11/</sup> H.R. Rep. No. 94-1220, 94 Cong., 2d Sess. 7, (1976).

excess charges should be used to assist section 236 projects which face financial difficulties, because of increased taxes and utility costs. HUD has failed to carry out this provision despite the specific legislative authority conferred 2 years ago, despite the fact that almost \$25 million in excess charges have been returned to HUD, and despite the fact that many projects face financial difficulties and a number have sought remedy under the 1974 provision. . . .

"Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time several judgments against HUD in cases involving more than 20 projects. HUD, however, persists in litigating rather than in obligating the funds authorized under section 236(g)." 12/

Senator Proxmire, floor manager for the bill, concurred with Senator Sparkman.

"I think it is a very good amendment. It is most important that we do our very best to keep the section 236 tax and utility subsidy program going. It is a good program. It is for low-income people.

"All we are asking, as I understand it, is that the money be kept in the program and not distributed elsewhere."  $\underline{13}$ /

Following these comments, the Senate passed the amendment deleting the proviso. However, the final bill reported by the Conference Committee of the House and the Senate contained the House's proviso. The Conference Report explained the Committee's action as follows:

<sup>12/</sup> 122 Cong. Rec. S 10775 (daily ed. June 26, 1976).

<sup>13/</sup> <u>Id</u>.

"Amendment No. 3: Restores language proposed by the House and stricken by the Senate making available any excess rental charges under Section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account.

"The committee of conference is agreed that this action shall not prejudice any suit now or hereafter before the courts in this area." 14/(Emphasis added).

The legislative history makes it clear that the proviso enables the Secretary to use the 236(g) reserve fund for other than Section 236 programs. However, it also makes clear that Congress did not intend to allow the Secretary to fail to implement the operating subsidies program. The statements of Senators Sparkman and Proxmire are to this effect, as is the statement in the Conference Report that its action "shall not prejudice any suit . . . in this area." Therefore, I conclude that there is no basis for altering my holding that the Secretary is under a mand tory duty to implement the operating subsidies program.

I do recognize, however, that the proviso authorizes the Secretary to use the fund for purposes other than 236 programs after October 1, 1976 (the effective date of Public Law 94-378). To the extent my earlier orders and the preliminary injunction are inconsistent with this fact, it is hereby modified. Thus, the Secretary, in her discretion, is free to spend the Section 236(g) funds on other programs after

H.R. Rep. No. 94-1362, 94 Cong., 2d Sess. (1976). 122 Cong. Rec. H 7685.

October 1. However, that portion of the fund necessary to maintain a <u>full</u> operating subsidies program in Connecticut  $\frac{15}{}$  must be so allocated. Only in this way will the relief granted by my earlier orders not be "prejudiced."  $\frac{16}{}$ 

For the foregoing reasons the defendants' Motion to Vacate the Order and Dissolve the Preliminary Injunction is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 27 day of September, 1976.

M. Joseph Blumenfeld
United States District Judge

On August 31, 1976, Circuit Judges Robb and Wilkey of the United States Court of Appeals for the District of Columbia denied defendants' motion for a stay of the district court's order pending appeal in Underwood v. Hills. In so ruling, Judges Robb and Wilkey considered the impact of Public Law 94-378 on that litigation and concluded that "the district court's order coes not preclude the Secretary from using the reserve fund to fund programs other than the operating subsidy program, 12 U.3.C. § 1715z-1 (f) (3), to the extent such other funding is authorized in Public Law 94-378." My present ruling reaches a similar result. However, I add that such other payments can be made only if the Secretary's allocation does not "prejudice" the relief granted to plaintiffs in this action.

The present ruling is not intended to dispose of the plaintiffs' motion for clarification of my earlier orders. That separate motion is still pending decision. The present ruling is concerned only with the intent of Public Law 94-378 on the relief granted in these actions.

EXHIBIT C

PHA FORM NO. 3135 Rev. 9/69 (Previous edition obsolete

## U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT FEDERAL HOUSING ADMINISTRATION

# REGULATORY AGREEMENT FOR NONPROFIT MORTGAGORS UNDER SECTION 236 OF THE NATIONAL HOUSING ACT, AS AMENDED

Project No.

Mortgagee

Amount of Mortgage Note

Date

Mortgage: Recorded:

State

County

Date

Book

Page

This Agreement entered into this

day of

10

between

3

whose address is

their successors, heirs, and assigns (jointly and severally, hereinafter referred to as Owners) and the undersigned Secretary of Housing and Urban Development and his successors, acting by and through the Federal Housing Commissioner (hereinafter called Commissioner).

In consideration of the endorsement for insurance by the Commissioner of the above described note or in consideration of the consent of the Commissioner to the transfer of the mortgaged property, and in order to comply with the requirements of Section 236 of the National Housing Act, as amended, and the Regulations adopted by the Commissioner pursuant thereto, Owners agree for themseives, their successors, heirs and assigns, that in connection with the mortgaged property and the project operated thereon and so long as the contract of mortgage insurance continues in effect, and during such further period of time as the Commissioner shall be the owner, holder or reinsurer of the mortgage, or during any time the Commissioner is obligated to insure a mortgage on the mortgaged property:

- Owners, except as limited by paragraph 18 hereof, shall prozaptly make all payments due under the note and moragege; provided, however, that the Commissioner shall make payments to the mortgagee on behalf of the Owners in accordance with the interest reduction contract between the mortgagee and the Commissioner.
- 2. (a) Owners shall establish or continue to maintain a reserve fund for replacements by the allocation to such reserve fund in a separate account with the mortgagee or in a safe and responsible depository designated by the mortgagee, concurrently with the beginning of payments towards amortization of the principal of the mortgage insured or held by the Commissioner of an amount equal to \$ per month unless a different date or amount is approved in writing by the Commissioner. Such fand, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America shall at all times be under the control of the mortgagee. Disbursements from such fund, whether for the purpose of effecting replacement of structural elements and mechanical equipment of the project or for any other purpose, may be made only after receiving the consent in writing of the Commissioner. In the event of a default in the terms of the Mortgage, pursuant to which the loan has been accelerated, the Commissioner may apply or authorize the application of the balance in such fund to the amount due on the mortgage debt as accelerated.
  - (b) Where Owners are acquiring a project already subject to an insured mortgage, the reserve fund for replacements to be established will be equal to the amount due to be in such fund under existing agreements or charter provisions at the time Owners acquire such project, and payments hereunder shall begin with the first payment due on the mortgage after acquisition, unless some other method of establishing and maintaining the fund is approved or required in writing by the Commissioner.
  - (c) Owners shall establish and maintain, in addition to the reserve fund for replacements, a residual receipts fund by depositing thereto, with the mortgagee, the residual receipts, as defined herein, within 60 days after the end of the semiannual or annual fiscal period within which such receipts are realized. Residual receipts shall be under the control of the Commissioner, and shall be disbursed only on the direction of the Commissioner, who shall have the power and authority to direct that the residual receipts, or any part thereof, be used for such purpose as he may determine.
- 3. Real property covered by the mortgage and this Agreement is described in Schedule A attached hereto.
- 4. The Owners covenant and agree that:
- (a) with the prior approval of the Commissioner, they will establish for each dwelling unit (1) a basic rental charge determined on the basis of operating the project with payments of principal and interest under a mortgage bearing interest at one percent and (2) a fair market rental charge determined on the basis of operating the project with payments of principal, interest and mortgage insurance premiums due under the insured mortgage on the project;
- (b) the rental charged for each unit, which will include all utilities except telephone, will be equal to 25% of the tenant's income or the basic rental, whichever is greater, but in no event shall the rental charged exceed the fair merket rental;
- (c) they shall limit admission to the project to those families whose incomes do not exceed the limits prescribed by the Commissioner, with the exception of those tenants who agree to pay fair market rental;
- (d) preference for occupancy shall be given to those families displaced from an arban renewal area, or as a result of governmental action, or as a result of a disaster determined by the President to be a major disaster, and to those families whose incomes are within the lowest practicable limits for obtaining rental units in the project;
- (e) on forms approved by the Commissioner they will obtain from each prospective tenant, prior to admission to the project, a certification of income, and a recertification of income from all tenants who are not paying fair market rental at interals as required by the Commissioner;

- (f) if any recertification reveals a change in income whereby the tenant becomes eligible for a lower or higher restal, such adjustment in rental charged shall be made, provided that rental shall never be less than basic rental and shall never exceed fair market rental;
- (g) in a manner prescribed by the Commissioner, they will obtain writter evidence substantiating the information given on the tenants' certifications and recertifications of income and shall retain the evidence in their files for three years;
- (h) they shall require all tenants who do not pay the fair market rental to execute a lease in the form prescribed by the Commissioner, and shall not rent any unit in the project for less than 30 days nor more than one year;
- (i) they shall remit to the Commissioner on or before the tenth day of each month the amount by which the total rentals collected on the dwelling units exceeds the sum of the approved basic rentals for all occupied units, which remittance shall be accompanied by a monthly report on a form approved by the Commissioner, provided that a monthly report must be filed even if no remittance is required;
- (j) they shall not restrict occupancy by reason of the fact that there are children in the family, except in those projects that are designed primarily for elderly persons;
- (k) they will rent commercial facilities, if any, at not less than the rental approved by the Commissioner;
- (1) no change will be made in the basic rental or fair market rental unless approved by the Commissioner;
- (m) no tenant shall be permitted to cent more than one unit at any given time without the prior written approval of the Commissioner;
- (a) if there are rent supplement units in the project, the determination as to the eligibility of tenants for admission to such units and the conditions of continued occupancy shall be in accordance with the Rent Supplement Contract executed by the Owners as 1 Commissioner which is incorporated in and made a part of this Agreement.
- 5. Upon prior written approval of the Commissioner, the Owners may charge to and receive from any tenant such amounts as from time to time may be mutually agreed upon between the tenant and the Owners for any facilities and/or services which may be furnished by the Owners or others to such tenant upon his request, in addition to the facilities and services included in the approved Rental Schedule.
- Owners agree that no dividends of any kind will be paid on the capital stock issued by the corporation, except as the charter
  may authorize due to domiciliary requirements.
- 7. Owners shall not without the prior written approval of the Commissioner:
  - (a) Convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of such property;
  - (b) Assign, transfer, dispose of, or encumber any personal property of the project, including rents, or pay out any funds, except for reasonable operating expenses and necessary repairs;
  - (c) Convey, assign, or transfer any beneficial interest in any trust holding title to the mortgaged property, or the interest of lany general partner in a partnership owning the mortgaged property, or any right to manage or receive the rents and profits from the mortgaged property;
  - (d) Remodel, add to, reconstruct, or demolish any part of the mortgaged property or subtract from any real or personal property of the project:
  - (e) Engage in any other business or activity, including the operation of any other rental project, or incur any liability or obligation not in connection with the project;
  - (f) Require, as a condition of the occupancy or leasing of any unit in the project, any consideration or deposit other than the prepayment of the first month's rent plus a security deposit is an amount not in excess of one month's rent to guarantee the performance of the covenants of the lease. Any fund collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall at all times equal or exceed the aggregate of all outstanding obligations under said account:
  - (g) Permit the use of the dwelling accommodations of the project for any purpose except the use which was originally intended, or permit commercial use greater than that originally approved by the Commissioner;
  - (h) Incur any liability, direct or contingent, other than for current operating expenses, exclusive of the indebtedness secured by the mortgage and necessarily incident to the execution and delivery thereof;
  - (i) Pay any compensation, including wages or salaries, or incur any obligations, to themselves, or any officers, directors, stockholders, trustees, partners, beneficiaries under a trust, or to any of their nominees;
  - (j) Enter into any contract or contracts for supervisory or managerial services.
- 8. Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition. In the event all or any of the buildings covered by the mortgage shall be destroyed or damaged by fire or other casualty, the money derived from any insurance on the property shall be applied in accordance with the terms of the insured mortgage.
- 9. Owners shall not file any petition in bankraptcy, or for a receiver, or in insolvency, or for reorganization or composition, or make any assignment for the benefit of creditors or to a trustee for creditors or permit an adjudication in bankruptcy, the taking possession of the mortgaged property or any part thereof by a receiver, or the seizure and sale of the mortgaged property or any part thereof under judicial process or pursuant to any power of sale and fail to have such adverse actions set aside within forty-five days.
- 10. (a) Owners shall provide for the management of the project in a manner satisfactory to the Commissioner. Any management contract entered into by Owners, or any of them, involving the project shall contain a provision that it shall be subject to termination, without penalty and with or without caur, upon written request by the Commissioner addressed to the Owners. Upon receipt of such request Owners shall immediately terminate the contract within a period of not more than thirty (30) days and shall make arrangements satisfactory to the Commissioner for continuing proper management of the project.
  - (b) Payment for services, supplies, or materials shall not exceed the amount ordinarily paid for such services, supplies, or materials in the area where the services are rendered or the supplies or materials furnished.

- (c) The mortgaged property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers relating thereto shall at all times be maintained in reasonable condition for proper audit and shall be subject to examination and inspection at any reasonable time by the Commissioner or his duly authorized agents. Owners shall keep copies of all written contracts or other instruments which affect the mortgaged property, all or any of which may be subject to inspection and examination by the Commissioner or his duly authorized agents.
- (d) The books and accounts of the operations of the mortgaged property and of the project shall be kept in accordance with the requirements of the Commissioner.
- (e) Within sixty days following the end of each fiscal year the Commissioner shall be furnished with a complete annual financial report based upon as examination of the books and records of the mortgagor prepared in accordance with the requirements of the Commissioner, certified to by an officer or responsible Owner and, when required by the Commissioner, prepared and certified by a Certified Public Accountant, or other person acceptable to the Commissioner.
- (f) At the request of the Commissioner, his agents, employees, or attorneys, the Owners shall furnish monthly occupancy reports and shall give specific answers to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation, and condition of the property and the status of the insured mortgage.
- (g) All rents and other receipts of the project shall be deposited in the name of the project in a bank, whose deposits are insured by the F.D.I.C. Such funds shall be withdrawn only in accordance with the provisions of this Agreement for expenses of the project and remittances to the Commissioner as required under Paragraph 4(i) above. Any owner receiving funds of the project shall immediately deposit such funds in the project bank account and failing so to do in violation of this Agreement shall held such funds in trust. Any owner receiving property of the project in violation of this Agreement shall immediately deliver such property to the project and failing so to do shall hold such property in trust.
- 11. Owners will comply with the provisions of any Federal, State, or local law prohibiting discrimination in housing on the grounds of race, color, creed, or national origin, including Title VI of the Civil Rights Act of 1964 (Public Law 88-352, 78 Stat. 241), all requirements imposed by or pursuant to the Regulations of the Department of Housing and Urban Development (24 CFR, Subtitle A, Part 1) issued pursuant to that title, and regulations issued pursuant to Executive Order 11063.
- 12. Upon a violation of any of the above provisions of this Agreement by Owners, the Commissioner may give written notice, thereof, to Owners, by registered or certified mail, addressed to the addresses stated in this Agreement, or such other addresses as may subsequently, upon appropriate written notice thereof to the Commissioner, be designated by the Owners as their legal business address. If such violation is not corrected to the satisfaction of the Commissioner within thirty days after the date such notice is mailed or within such further time as the Commissioner reasonably determines is necessary to correct the violation, without further notice the Commissioner may declare a default under this Agreement effective on the date of such declaration of default and upon such default the Commissioner may:
  - (a) (1) If the Commissioner holds the note declare the whole of said indebtedness immediately due and payable and then proceed with the foreclosure of the mortgage;
    - (2) If said note is not held by the Commissioner notify the holder of the note of such default and request the holder to declare a default under the note and mortgage, and the holder after receiving such notice and request, but not otherwise, at its option, may declare the whole indebtedness due, and thereupon proceed with foreclosure of the mortgage, or assign the note and mortgage to the Commissioner as provided in the Regulations;
  - (b) Collect all rests and charges in connection with the operation of the project and use such collections to pay the mortgagor's obligations under this Agreement and under the note and mortgage and the necessary expenses of preserving the proper ty and operating the project;
  - (c) Take possession of the project, bring any action necessary to enforce any rights of the Owners growing out of the project operation, and operate the project in accordance with the terms of this Agreement until such time as the Commissioner in his discretion determines that the Owners are again in a position to operate the project in accordance with the terms of this Agreement and in compliance with the requirements of the note and mortgage;
  - (d) Apply to any court, State or Federal, for specific performance of this Agreement, for an injunction against any violation of the Agreement, for the appointment of a receiver to take over and operate the project in accordance with the terms of the Agreement, or for such other relief as may be appropriate, since the injury to the Commissioner arising from a default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain;
  - (e) Terminate the interest reduction payments to the mortgagee made pursuant to Paragraph I hereinabove.
- 13. As security for the payment due under this Agreement to the reserve fund for replacements, and to secure the Commissioner because of his liability under the endorsement of the note for insurance, and as security for the other obligations under this Agreement, the Owners respectively assign, pledge and mortgage to the Commissioner their rights to the rents, profits, income and charges of whatever sort which they may receive or be entitled to receive from the operation of the mortgaged property, subject, however, to any assignment of rents in the insured mortgage referred to herein. Until a default is declared under this Agreement, however, permission is granted to Owners to collect and retain under the provisions of this Agreement such rents, profits, income, and charges, but upon default this permission is terminated as to all rents due or collected theresider.
- 14. As used in this Agreement the term:
  - (a) "Mortgage" includes "Deed of Trust", "Chattel Mortgage", and any other security for the note identified herein, and cadorsed for insurance or held by the Commissioner;
  - (b) "Mortgagee" refers to the holder of the mortgage identified herein, its successors and assigns;
  - (c) "Mortgagor" means the original borrower under the mortgage and its successors and assigns;
  - (d) "Owners" refers to the persons named in the first paragraph hereof and designated as Owners, their successors or assigns; such term includes a nonprofit corporation executing this Agreement in its capacity as a contract purchaser of the project pursuant to a Sales Agreement with a Builder-Seller mortgagor;
  - (e) "Mortgaged Property" includes all property, real, personal, or mixed, covered by the mortgage or mortgages securing the late endorsed for insurance or held by the Commissioner;

- (f) "Project" includes the mortgaged property and all its other assets of whatsoever nature or wheresoever situate, used in or owned by the business conducted on said mortgaged property, which business is providing housing and other such activities as are incidental thereto;
- (g) "Residual Receipts" means any cash remaining after:
  - (1) the payment of:
    - All sums due or currently required to be paid under the terms of any mortgage or note insured or held by the Federal Housing Commissioner;
    - (ii) All amounts required to be deposited in the reserve fund for replacements;
  - (iii) All obligations of the project other than the mortgage insured or held by the Commissioner unless funds for payment are set aside or deferment of payment has been approved by the Commissioner;
  - (iv) Remittances due to the Commissioner as required by Paragraph 4(i); and
  - (2) the segregation of:
    - (i) An amount equal to the aggregate of all special funds required to be maintained by the project;
    - (ii) All tenant security deposits held;
    - (iii) That portion of rentals which must be remitted to the Commissioner in accordance with Paragraph 4(i), but not yet due.
- (h) "Family" means (1) two or more persons related by blood, marriage, or operation of law, who occupy the same unit; (2) a handicapped person who has a physical impairment which is expected to be of long continued and indefinite duration, substantially impedes his ability to live indept adeptly, and is of such a nature that his ability to live independently could be improved by more suitable housing conditions; (3) a single person, 62 years of age or older; or (4) a single person less than 62 years of age provided that occupancy by such persons is limited to 10% of the dwelling units in the project;
- (i) "Income" means the gross annual income of the family from all sources before taxes and withholding, after giving effect to exclusions allowed by the Commissioner;
- (j) "Default" means a default declared by the Commissioner when a violation of this Agreement is not corrected to his satisfaction within the time allowed by this Agreement or such further time as may be allowed by the Commissioner after written notice.
- 15. This instrument shall bind, and the benefits shall inure to, the respective Owners, their heirs, legal representatives, executors, administrators, successors in office or interest, and assigns, and to the Commissioner and his successors so long as the contract of mortgage insurance continues in effect, and during such further time as the Commissioner shall be the owner, holder, or reinsurer of the mortgage, or obligated to reinsure the a.ortgage.
  - (a) In the event this Agreement is executed by a nonprofit corporation in its capacity as a contract purchaser of the project pursuant to a Sales Agreement with a Builder-Seller mortgagor, said nonprofit corporation agrees that all of the provisions bereof shall continue to bind it in its capacity as title owner of the project upon consummation of the purchase. In the event the purchase is not consummated at final endorsement or such later time as may be agreed to in writing by the Commissioner, its obligations hereunder shall terminate.
- 16. Owners warrant that they have not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling as to the rights and obligations set forth and supersede any other requirements in conflict therewith.
- 17. The invalidity of any clause, part or provision of this Agreement shall not affect the validity of the remaining portions there of.
- 18. The following Owners:

do not assume personal liability for payments due under the note and morrgage, to the reserve for replacements, or formatters not under their control, provided that such Owners shall remain liable under this Agreement only with respect to the matters hereinafter stated; namely:

- (a) for funds or property of the project coming into their hands which, by the provisions hereof, they are not catilled to retain; and
- (b) for their own acts and deeds or acts and deeds of others which they have authorized in violation of the provisions hereof.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals on the date first hereinabove written.

Seal	***	Owners
WITNESS		
	£2	Ву
		SECRETARY OF HOUSING AND URBAN DEVELOPMENT acting by and through the FEDERAL HOUSING COMMISSIONER
		By
(Add proper acknowledgments )		

FHA FORM NO. 3135-A

### U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT FEDERAL HOUSING ADMINISTRATION

#### ADDENDUM TO REGULATORY AGREEMENT

For Projects eligible as llousing for the Elderly or Handicapped under Section 202 of the llousing Act of 1959, as amended

FHA Project No.

The Regulatory Agreement for Nonprofit Mortgagors under Section 236 of the National Housing Act, as amended, (FHA Form No. 3135), is hereby amended by the following additions or modifications:

- 1. The following new subparagraphs (d), (e), (f), (g), (h), (i) and (j), are hereby added to Paragraph 2 of the Regulatory Agreement.
- "(d) Owners covenant and agree that they will deposit to the credit of a special account, to be known as the "Revenue Fund Account", the Initial Operating Capital specified in subparagraph (i) herein and all rentals, charges, income and revenue arising from the operation or ownership of the project. Such Revenue Fund Account shall be held in the custody of the Treasurer of the Owners separate and apart from all other funds and shall be expended and used by the Treasurer only in the manner and order specified below:"
- "(e) On the first day of each month after final endorsement of the Note for mortgage insurance, the Owners shall pay to the Mortgagee, or its designee, from the Revenue Fund Account and from their general funds, if necessary, all payments due under the note and mortgage;"
- "(f) On or before the tenth day of each month the Owners shall remit to the Commissioner from the Revenue Fund Account, the amount by which the total rentals collected on the dwelling units exceed the sum of the approved basic rentals for all occupied units, which remittances shall be accompanied by a monthly report on a form approved by the Commissioner, provided that a monthly report must be filed even if no remittance is required;"
- "(g) Current Expenses of the Project shall be payable from the Revenue Fund Account as the same become due and payable after the deposits and payments specified in subparagraphs 2(a), 2(e) and 2(f) have been made. Current Expenses shall include all necessary operating expenses, current maintenance charges, expenses of reasonable upkeep and repairs and all other expenses incident to the operation of the project, but shall exclude depreciation;"
- "(h) Owners covenant and agree that they will deposit into the Residual Receipts Fund Account provided for in subparagraph 2(c) of the Agreement, the balance remaining in the Revenue Fund Account in excess of a sum sufficient to provide for estimated Current Expenses for the project for the next thirty (30) days."
- "(i) Prior to initial endorsement of the note for mortgage insurance, the Owners will provide Initial Operating Capital: (1) from sources other than the insured mortgage and from sources and in a manner which will not jeopardize the security for the loas, for the furnishings and moveable equipment necessary to the full enjoyment of the use, occupancy, and operation of the Project, and (2) present evidence satisfactory to the Mortgagee and the Commissioner that they are able to finance, from other than the proceeds of the insured mortgage or Project Revenues, at least 25% of the estimated annual operating expenses as shown in the Initial Budget of Revenues and Expenses."
- "(j) Owners covenant and agree that on or before thefirst day of each fiscal year during which the insured mortgage is outstanding, they will file with the Commissioner an Annual Budget of Revenues and Expenses as hereinafter set forth, for the Project for that fiscal year. The Budget shall include all necessary operating expenses, current maintenance charges, expenses of reasonable spikeep and repairs, and deposits into the Reserve Fund for Replacements, hereinbefore provided, taxes and special assessment levies, proprated amounts required for insurance and all other expenses incident to the operation of the project; and shall show the antio-ipated or expected revenues to pay such expenses and make such deposits plus the requisite debt service. The Owners covenant that the expenses incurred, exclusive of deposits into the Reserve Fund for replacements provided for in subparagraph 2(c), in any year will not exceed the reasonable and necessary amount thereof and that they will not expend any amount or incur any obligations for the maintenance, repair, operations and replacements in excess of amounts provided for in the Annual Budget except upon written certification by the Owners to the Commissioner that such expenses were unanticipated and are necessary. Nothing contained in this paragraph shall limit the amount which the Owners may expend in any year provided any emount expended thereof in excess of the Annual Budget shall be obtained by the Owners from some source other than the revenues of the project and the Owners shall not make any reimbursement therefor from project revenues."
- 2. Subpargraphs 4(c) and 4(d) of the Regulatory Agreement are hereby modified and amended to change the word "families" to read "elderly or handicapped families." Subparagraph 4(c) is further modified and amended by deleting the clause "with the exception of those tenants, who agree to pay fair market rental." Subparagraph 4(i) of the Regulatory Agreement is hereby deleted.
- 3. Subparagraph 10(g) of the Regulatory Agreement is hereby modified and amended to rend as follows:

  "All rents and other receipts of the project shall be deposited in the Revenue Fund Account in the name of the project in a bank, whose deposits are insured by F.D.I.C. Such funds shall be withdrawn only in accordance with the provisions of this Agreement for expenses of the project and remittance to the Commissioner as required above. Any owner or other person receiving funds of the project shall immediately deposit such funds in the Revenue Fund Account and failing so to do in violation of the Agreement shall hold such funds in trust. Any owner or other person receiving property of the project in violation of this Agreement shall immediately deliver such property to the project and failing so to do shall hold such property in trust."
  - 4. The following new subparagraphs (h) and (i) are hereby added to Paragraph 10 of the Regulatory Agreements

- "(h) Basic management powers of the Owners shall be vested in a Board of Trustees (or Directors) of no less than seven persons, acceptable to the Commissioner, fully independent and broadly representative of public interest groups, with reasonable assurance that there will be a continuity of a qualified Board of Trustees (or Directors) over the life of the insured mortgage. The Owners shall file with the Commissioner a report showing changes in their Board of Directors and officers, promptly upon the making of any such changes and annually in any event, together with such other information concerning their Board and officers as the Commissioner shall from time to time require."
- "(i) No officer, director, trustee, member, stockholder not the authorized representative of the Owners shall have any financial interest in any contractual arrangement entered into by the Owners in connection with rendition of services, the provision of goods or supplies, management of the project, procurement of furnishings and equipment, construction of the project, procurement of the site or other matters whatever."
- 5. Subparagraph 14(h) of the Regulatory Agreement is hereby modified and amended to read as follows:
  "Family" means (1) two or more persons, the head of which or his spouse is 62 years of age or older, related by blood, marriage, or operation of law; who occupy the same unit; (2) a handicapped person who has a physical impairment which is expected to be of long continued and indefinite duration, substantially impeded his ability to live independently, and is of such a nature that his ability to live independently could be improved by more suitable housing conditions; or (3) a single person, 62 years of age or older;."
- 6. Subparagraph 14(i) of the Regulatory Agreement is hereby modified and amended to read as follows:
  "Income means the gross annual income of the family from all sources, including Social Security benefits, before taxes and withholding, after giving effect to exclusions allowed by the Commissioner;."
- 7. Paragraph 18 of the Regulatory Agreement is hereby deleted in its entirety; and the phase, "except as limited in paragraph 18 hereof," in paragraph 1 is accordingly deleted.

246836-P

EXHIBIT D

#### UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT

VERNICE DUBOSE, et al.,

Plaintiffs,

: CIVIL ACTION NO. H-75-303

CARLA HILLS, et al.,

Defendants.

CLAUDIA WALTER, et al.,

Plaintiffs,

CIVIL ACTION NO. H-75-345

CARLA HILLS, et al.,

Defendants.

JANETTE LITTLE, et al.,

Plaintiffs,

CIVIL ACTION NO. H-75-346

CARLA HILLS, et al.,

Defendants.

#### STIPULATION

It is hereby stipulated and agreed between the undersigned counsel for the Federal Defendants and the respective counsel for the Plaintiffs herein that the Federal Defendants will delay making refunds to project owners in Connecticut pursuant to Transmittal No. 24 until such time as the Court rules on the Plaintiffs' Motion for a Preliminary Injunction seeking to enjoin payments of said refunds.

PETER C. DORSEY

United States Attorney

O MTED: 9/13/76

OND L. SWELFART stant U. S. Attorney

Attorney Department of Justice

DENNIS J. O'BRIEN
Tolland-Windham Legal Assistance
Program, Inc.

JAMES C. STURDEVANT
Tolland Windham Legal Assistance
Program, Inc.

JOHN A. DZIAMBA
Tolland-Windham Legal Assistance Program, Inc.

RAYMOND R. NORKO Hartford Tegal Aid Society

EXHIBIT E

94TH CONGRESS HOUSE OF REPRESENTATIVES

2d Session

DOCUMENT No. 94-558

#### NOTICE OF PROPOSED SUIT TO REQUIRE REMEASE OF RENTAL HOUSING ASSISTANCE FUNDS

#### COMMUNICATION

FROM

#### THE COMPTROLLER GENERAL OF THE UNITED STATES

TRANSHITTING\_

NOTICE OF HIS INTENTION TO BRING CIVIL ACTION TO REQUIRE THE RELEASE OF FUNDS FOR THE OPERATING SUBSIDIES PRO-GRAM UNDER SECTION 212 OF THE HOUSING AND COMMUNITY DÉVELOPMENT ACT OF 1974, THÉ DE FACTO RESCISSION OF WHICH HE REPORTED TO CONGRESS (H. DOC. NO. 94-466), ON WHICH CON-GRESS DID NOT COMPLETE ACTION DURING THE STATUTORY FORTY-FIVE DAYS OF CONTINUOUS SESSION WHICH EXPIRED ON JUNE 16, 1076, AND WIHCH HAVE NOT BEEN RELEASED BY THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PURSUANT TO SECTION 1016 OF PUBLIC LAW 93-344

July 10, 1976.—Referred to the Committee on Appropriations and ordered to be printed

> COMPTROLLER GENERAL OF THE UNITED STATES, Washington, D.C., July 7, 1976.

Hon. CARL ALBERT, Speaker of the House.

DEAR MR. SPEAKER: The purpose of this letter is to inform you of the status of budget authority, proposed to be rescinded pursuant to the Impoundment Control Act of 1974, Public Law 93-344, for which the Congress did not complete action before the relevant 45-day period of continuous session, which expired on June 16, 1976. This letter also constitutes the statement required by section 1016 of the Impoundment Control Act in order for the Comptroller General to initiate a civil

action to require the release of budget authority.

Section 212 of the Housing and Community Development Act of 1974, Public Law 93-383, created an operating subsidy program. This program provided for making payments to assist owners of rental housing projects, under section 206 of the National Housing Act, to meet higher operating costs resulting from increased property taxes

and utility costs. The 1974 Act provided that these payments be made from a reserve fund—the Rental Housing Assistance Fund—comprised of excess rents paid by tenants residing in section 236 projects

and interest earned by the Fund.

As of May 31, 1976, the balance in the Fund was approximately \$47.2 million. The Department of Housing and Urban Development estimates this balance may increase to approximately \$55 million by the end of Fiscal Year 1977. HUD estimated that about \$18 million from the Fund would be used to compensate project owners for excess rent payments erroneously remitted to HUD prior to June 1975. This action, however, may not be implemented due to a recently initiated court suit in which the plaintiffs are seeking to enjoin HUD from making its planned remittances. HUD estimates that \$300,000 will be used to make court-ordered payments under the operating subsidy program to those section 236 project owners who successfully sued HUD to require implementation of the program as regards those projects. HUD officials have informed us that they have no plans to utilize the fund for any operating subsidy program payments that are not mandated by court order.

Section 1015(a) of the Impoundment Control Act requires the Comptroller General to report to the Congress whenever he finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States or any other officer or employee of the United States has ordered, permitted, or approved the establishment of a reserve or deferral of budget authority and the President has failed to transmit a special message

with respect to such reserve or deferral.

On April 20, 1976, I submitted a report to the Congress with respect to a rescission of \$26.3 million of Department of Housing and Urban Development budget authority available for the operating subsidy program that should have been, but was not, reported to the Congress by the President. My report had the same legal effect as a rescission

message transmitted by the President.

Section 1012(b) of the Act provides:

"(b) REQUIREMENT TO MAKE AVAILABLE FOR OBLIGATION.—Any amount of budget authority proposed to be rescinded or that is to be reserved as set forth in such special message shall be made available for obligation unless, within the prescribed 45-day period, the Congress has completed action on a rescission bill rescinding all or part of the amount proposed to be rescinded or that is to be reserved."

The statutory 45 days of continuous congressional session for the Congress to complete action on a reseission bill involving this budget authority expired on June 16, 1976. Pursuant to section 1012(b) of the Act this budget authority was required to be released for obligation by the President on that date. We have been informed by the Office of Management and Budget that the budget authority involved

will not be released.

Section 1016 of the Impoundment Control Act empowers the Comptroller General to institute a civil action in the United States District Court for the District of Columbia to require the release of budget authority that is to be made available for obligation pursuant to section 1012(b), above. Section 1016 also provides that, at least 25 days

before the initiation of such a suit, the Comptroller General file with the Congress an explanatory statement of the circumstances giving rise to the action contemplated. On the basis of the present circum-

stances, we contemplate bringing such an action.

We would point out, however, that certain provisions of the Department of Housing and Urban Development—Independent Agencies Appropriation Bill, 1977, as passed by the House, would disperse the Fund to a number of other housing programs. Thus, it may develop that suit will not be necessary to require the release of the budget authority to the operating subsidy program. Nevertheless, in light of the uncertainty of the appropriations process and in order to avoid belated need to accommodate the statutory 25-day waiting period, we are notifying the Congress of our intention to bring suit on the basis of the present situation.

0

Sincerely yours,

ELMER B. STAATS, Comptroller General of the United States.

II D. 558

EXHIBIT F



# COMPTROLLER GENERAL OF THE UNITED STATES WASHINGTON, D.C., 2048

April 20, 1976

B-115398

Speaker of the House President of the Senate

This letter reports a rescission of Department of Housing and Urban Development (HUD) budget authority which should have been, but was not, reported to the Congress pursuant to the provisions of the Impoundment Control Act of 1974.

Section 212 of the Housing and Community Development Act of 1974, P.L. 93-383, created an operating subsidy program for making payments to assist owners of section 236 projects in meeting higher operating costs resulting from increased property taxes and utility costs. The 1974 Act also provided that these payments be made from a reserve fund--Rental Housing Assistance Fund--that is comprised of excess rents paid by tenants residing in section 236 projects and interest earned by the fund. We have been informed by HUD officials that the Department does not intend to implement the operating subsidy program.

As of March 31, 1976, the balance in the fund was approximately \$44.6 million and HUD documents project that the balance will increase to approximately \$48.7 million by the end of fiscal year 1977. HUD estimates that about \$18 million from the fund will be used to compensate project owners for excess rent payments erroneously remitted to HUD prior to June 1975. This action, however, may not be implemented due to a recently initiated court suit in which the plaintiffs are seeking to enjoin HUD from making its planned remittances. In addition, HUD estimates that, for fiscal year 1976, another \$300,000 will be needed to make court ordered payments under the operating subsidy program to those section 236 projects that are successful plaintiffs in lawsuits designed to require HUD to implement the program as regards those projects.

HUD officials inform us that they have no plans to utilize any of the remaining \$26.3 million, therefore, we believe that at a minimum, \$26.3 million is being permanently withheld from obligation for operating subsidy

receives this report.

Section 1015(a) of the Impoundment Control Act requires the Comptroller General to report to the Congress whenever he finds that the President, the Director of the Office of Management and Budget, the head of any department or agency of the United States or any other officer or employee of the United States has ordered, permitted, or approved the establishment of a reserve or deferral of budget authority and the President has failed to transmit a special message with respect to such reserve or deferral. This report is submitted in accordance with the requirement imposed by section 1015(a) and, consequently has the same effect as if it were a rescission message transmitted by the President. The statutory 45 calendar days of continuous congressional session that the Congress has to complete action on a rescission bill involving this budget authority will be based on the date that the Congress

Temes 19. Their

Comptroller General of the United States

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

WESTERN DIVISION

PARKER SQUARE TENANTS ASSOCIATION, et al.,

Plaintiffs,

Plaintills,

THE DEPARTMENT OF HOUSING AND RBAN DEVELOPMENT, et al.,

Defendants.



Civil Action . No. 75CV577-W-3

ORDER DETERMINING THAT THIS ACTION IS PROPERLY MAINTAINABLE AS A CLASS ACTION AND ORDER GRANTING PRELIMINARY INJUNCTION TO COMPEL DEFENDANTS TO IMPLEMENT RENT SUBSIDIES PROGRAM UNDER SECTION 236(f)(3) OF NATIONAL HOUSING ACT

Plaintiffs are an association of low income tenants, and several individual low income tenants, who reside at Charlie Parker Square Homes, a housing project financed, operated and managed pursuant to Section 236 of the National Housing Act, Section 1715z-1, Title 12, United States Code. Plaintiffs seek to compel the private defendants to apply for, and defendant Carla Hills, Secretary of Housing and Urban Development (hereinafter "HUD"), to implement, the operating subsidies provisions of Section 236(f)(3) and (g) of the National Housing Act, as amended by Section 212 of the Housing and Community Development Act of 1974, Pub. L. 93-383 (August 22, 1974), Sections 1715z-1(f)(3) and (g), Title 12, United States

Code (hereinafter Sections 236(f)(3) and (g). Both declaratory and injunctive relief are sought. A stipulation of uncontroverted facts has been filed. Plaintiffs have moved for a preliminary injunction, a determination that the action proceed as a class action and for summary judgment. Defendants have also moved for summary judgment. Because the motions for summary judgment are deemed premature at this time, only the motions for a preliminary injunction and for a class determination will be considered.

1

Defendants assert that this Court does not have

jurisdiction in this action under any of the jurisdictional
statutes cited by plaintiffs. However, because the

commerce power is a significant source of federal power

for the National Housing Act, Jurisdiction is conferred

by Section 1337, Title 28, United States Code. Davis v.

Romney, 490 F.2d 1360 (3rd Cir. 1974); Dubose v. Hills,

F.Supp. (D.Conn. December 15, 1975); Ross v.

Community Services, Inc., 396 F.Supp. 278 (D.Md. 1975);

Bloodworth v. Cxford Village Townhouses, Inc., 377 F.Supp.

709 (N.D.Ga. 1974); Dew v. McLendon Gardens Associates,

394 F.Supp. 1223 (N.D.Ga. 1975); Mandina v. Lynn, 357

F.Supp. 269 (W.D.Mo. 1973); Cf.: Winningham v. United

States Department of Housing and Urban Development, 512

F.2d 617 (5th Cir. 1975). But see: Potrero Hill Community

Action Committee v. Housing Authority of the City and County of San Francisco, 410 F.2d 974 (9th Cir. 1969).

Because plaintiffs seek to compel the federal defendants to perform various mandatory duties owed to them, jurisdiction is also conferred by Section 1361, Title 28, United States Code. Dubose v. Hills, supra; Ross v. Community Services, Inc., supra.

II

This action is properly maintainable as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The parties have stipulated that there are a minimum of 60 families currently residing in Charlie Parker Square Homes who are eligible for operating subsidies; thus, the class is so numerous that joinder of all the members is impractical. The question of the Secretary's duties under Section 236(f) and (g) is common to the class. The claims of each of the representative parties with respect to the right to operating subsidies are typical of the class. The representative parties are represented by experienced and able counsel, and will fairly and adequately protect the interests of the class. The action is properly maintainable under Rule 23(b)(2) because the Secretary has "refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Section 236 of the National Housing Act was enacted in 1968 to establish an assistance program for rental and cooperative housing for low and moderate income families. Under Section 236, the Secretary of HUD was authorized to make interest reduction payments and provide mortgage insurance to private parties who would undertake to build or rehabilitate rental housing projects. As a condition for receiving Section 236 benefits, the private owner agrees to charge lower rents to eligible families. The rental charge for Section 236 housing is the greater of: (a) 25% of the tenant's gross income; or (b) the "basic rental charge" determined on the basis of operating the project with the reduced interest and mortgage insurance premiums, but in no event will the rental exceed the apartment's fair market rental.6 Interest reduction payments and mortgage insurance are commonly referred to as the "production subsidy."

By 1974, rising operating costs for Section 236
projects were causing many low income tenants to pay far
more than 25% of their incomes for rent, resulting in
abandament of Section 236 housing by many of those
tenants and thus frustration of the purposes of the
program. In response to this problem, Congress enacted
Section 212 of the Housing and Community Development Act

of 1972 can authorized a greater mix of high income tenants; 7 established a "deep subsidy" program for tenants whose incomes are too low to afford basic rentals with 25 percent of their incomes; 8 and established an "operating subsidies" program under which the Secretary is authorized to make assistance payments to projects experiencing rising local property taxes and utility costs. 9 It is the "operating subsidy" program which is at issue in this action.

Under the "operating subsidies" program, quoted in the footnote, 10 the Secretary is directed to establish for each project an "initial operating expense level" which is the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied or not later than 180 days after August 22, 1974, with respect to projects assisted under contracts entered into prior to that date. The Secretary is then "authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level" in order to maintain basic rentals for each unit between 25 and 30 percent of the incomes of the tenants occupying such units. Section 236(f)(3). An excess rental charges reserve fund is established, into which project owners

pay all rental charges collected in excess of the basic rental charges, and from which the Secretary is authorized to make the operating assistance payments "[d]uring any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments." Section 236(g).

The Secretary of HUD has not implemented any of the provisions of Sections 236(f) and (g) except that of establishing the reserve fund for two reasons. First, the Secretary contends that she has discretion under the statute not to implement the program; and, she has exercised her discretion not to implement the program because she believes: (1) the program is inequitable as it provides relief to only a small proportion of HUD assisted multifamily projects; and (2) a more comprehensive general multifamily default policy is necessary. Second, the Secretary has not determined that the balance in the reserve fund is sufficient to meet the estimated operating subsidy payments for the remainder of Fiscal Year 1976, and she has properly exercised her discretion to allocate existing contract authority to other programs.

Plaintiffs contend first, that the Secretary does not have discretion to disregard or indefinitely defer the authorization granted to her by Sections 236(f) and (g); second, that to the extent the Secretary does have discretion to decline to make operating assistance payments,

the refusal in this case is arbitrary, capricious and constitutes an abuse of discretion.

The issues thus ripe for determination are: (1) whether the Secretary has discretion to refuse to implement the operating subsidies program for the reasons given; and (2) to the extent that the Secretary does have discretion, whether her exercise of that discretion is arbitrary and capricious. See: Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 28 L.Ed.2d 136, 91 S.Ct. 814 (1971). It is concluded that the scope of the Secretary's discretion is not as broad as that asserted by the Secretary, and, to the extent the Secretary possesses discretion, that the exercise thereof in this case has been arbitrary and capricious in several respects. Similar conclusions have been reached in <u>Dubose v. Hills</u>, supra; Harrison v. Hills, supra; and Ross v. Community Services, Inc., supra.

IV

The Secretary relies on the statutory language, the legislative history of the statute and Congressional funding actions in support of her position that she is accorded discretion by the statute to refuse to implement the operating subsidies program. However, none of these sources supports the broad discretion not to implement any of the provisions of the operating subsidies program asserted by the Secretary.

## A. Statutory Language.

The Secretary emphasizes the language: "At any time

subsequent to the establishment of an initial operating expense level, the Jecretary is <u>authorized</u> to make, and contract to make, additional assistance payments...."

Section 236(f)(3) (emphasis supplied). She contends that this language was not intended to create a mandatory duty to implement the program. She argues that language which is intended to compel action contains the word "shall", referring in comparison to use of the word "shall" by Congress in the "deep subsidy" program. 11 However, use of the word "authorized" must be read in the context of the entire section. The language employed in other provisions of Sections 236(f)(3) and (g) does create several mandatory duties in administration of the program.

The statute provides that there "shall be established" an initial operating expense level, which, in the case of projects assisted under contracts entered into prior to August 27, 1974, "shall be established by the Secretary not later than 180 days after August 22, 1974." With respect to the excess rental charges reserve fund, the statute requires that the project owner "shall" pay all excess rental charges to the Secretary; that the excess charges "shall be credited to a reserve fund to be used by the Secretary to make additional assistance payment"; and that during any period the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess

charges "shall be credited" to authorized appropriations and "shall be available until the end of the next fiscal year for the purpose of making assistance payments."

When the language "authorized to make, and contract to make" is read in the context of these mandatory duties, the legislative history of the statute and other Congressional actions noted below, it is concluded that Congress did not intend to accord the Secretary absolute discretion to refuse to implement the "operating subsidies" program. Rather, Congress employed the term "authorized" instead of "shall" to indicate that assistance payments are not required in every case where the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but only when "the Secretary finds that the increase in the cost of utilities or local property taxes is reasonable and comparable to cost increases affecting other rental projects in the community," and the Secretary has determined that the balance in the reserve fund is adequate. Congress intended to accord the Secretary some measure of discretion to encourage efficient management of Section 236 projects, and to make the initial determination concerning use of the reserve fund, but it did not intend to accord the Secretary discretion to veto the entire program. Dubose v. Hills, \_\_\_ F.Supp. \_\_ (D.Conn. December 15, 1975); Ross v. Community Services, Inc., 396 F.Supp. 278 (D.Md. 1975); Harrison v. Hills,

F.Supp. \_\_\_ (W.D.Pa. October 1, 1975).

## B. Legislative History.

The legislative history of Sections 236(f)(3) and (g) illustrates the congressional concern with the problems experienced by Section 236 projects when costs rise above those initially projected. Congress noted that the burden of cost increases falls on low income tenants who are forced either to pay much more than 25 percent of their incomes for their apartments, or to abandon the project, thus threatening the economic feasibility of the project and frustrating the purposes of Section 236.12 As the Senate Report quoted in footnote 12, and the Conference Report 13 note, however, Congress intended to develop a provision "which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management. "14 These statements of legislative intention provide no support for the Secretary's position that Congress intended to accord her discretion to refuse to implement any of the provisions of the program. To the contrary, the statements reflect the congressional expectation that the Secretary would implement the program to alleviate the burden caused by rising property taxes and utilities in a manner which would foster efficient management. Thus, the legislative history supports the conclusion that the scope of discretion accorded the Secretary is much narrower than she

asserts. While she has discretion to deny operating assistance payments to poorly managed projects, she has no such discretion in the case of projects which are managed efficiently assuming the reserve fund to be adequate. <u>Dubose</u> v. <u>Hills</u>, <u>supra</u>.

The Secretary focuses on the statements in the Senate Report that the Secretary "would be authorized" to provide additional assistance payments; that the reserve fund "would be made available" for the making of additional assistance payments; and that the reserve fund "may be used" by the Secretary to make the additional payments. However, these statements must be read in the context of the congressional concern with the burdens caused by rising costs in Section 236 projects. Had Congress intended to make implementation of the program completely optional. it could have so stated. In the absence of such an expressed intention, the above language must be construed, as the statutory language, to refer to the Secretary's narrow discretion to consider the efficiency of a project's management and the adequacy of the reserve fund in making the additional assistance payments.

## C. Congressional Funding Actions.

The Secretary contends that the actions of Congress in funding the operating subsidies program in Sections 236(f)(3) and (g) reveal a congressional intention to vest the Secretary with discretion not to implement the program.

An understanding of her argument requires an explanation of the specific method by which Congress funds the Section 236 program as a whole.

As a general rule, before the Secretary can make assistance payments under Section 236, Congress must not only authorize the Secretary to enter into contracts with project owners as it has done in Section 236, but it must also: (1) authorize appropriation of funds for use in making such payments; and (2) actually release contract authority by appropriating the sums authorized. The actual release of contract authority and appropriation of funds are done in appropriation acts which are separate and apart from Section 236, the enabling statute. Compare:

Train v. City of New York, 420 U.S. 35 n. [2], 95 S.Ct. 839, 43 L.Ed.2d 1 (1975).

The Secretary's argument is essentially: (1) that

Congress has released no new contract authority or appropriated new funds for use in the operating subsidies program;

(2) that contract authority must be expended in making

payments from the excess rentals reserve fund 20 ablished

in Section 236(g); and (3) that Congress has vested the

Secretary with discretion to allocate already released contract authority and appropriations among Section 236 programs,

and she has properly exercised her discretion, consistent

with her interpretation of Congressional intent, to allocate

such authority to other Section 236 programs.

The Secretary is correct in her contention that

Congress has not released any new contract authority or
appropriated new funds for use in the operating subsidies

program. In the Housing and Community Development Act of

1974, Congress increased the authorization of contract

authority for the Section 236 program as a whole by \$75,000,000.15

But, in the two appropriation acts enacted subsequent to the

Housing and Community Development Act of 1974, Congress did

not release any new contract authority for the operating

subsidies program. 16

However, it does not appear that Congress intended to require the Secretary to expend contract authority in making assistance payments under the operating subsidies program from the excess rentals reserve fund. Congress authorized the Secretary "to make, and contract to make" additional assistance payments under Section 236(f)(3). Congress provided a special reserve fund apart from appropriations acts from which the assistance payments could be made in Section 236(g). The excess rental charges credited to the reserve fund are "to be used by the Secretary to make additional assistance payments"; and, during any period that the Secretary determines the balance in the reserve fund to be adequate, the excess charges "shall be credited" to authorized appropriations and "shall  $\mu^-$  available until the end of the next fiscal year for the purpose of making assistance payments.... The amounts in the

reserve fund thus become available to the Secretary for use in making operating subsidy payments automatically, once the balance in the reserve fund is determined to be adequate, without the necessity of an appropriation so long as the amounts involved remain within the authorization ceiling of Section 236(i). "Under this view of the statute, direct payments can be made out of the reserve fund, not pursuant to any contract and, hence, without reducing the Secretary's available contract authority."

Dubose v. Hills, supra, at \_\_\_\_.

In addition to the reserve fund, Congress has authorized the Secretary to use contract authority released prior to enactment of the Housing and Community Development Act of 1974 to make assistance payments under the operating subsidies program. 17 In making that authorization, Congress did not compel the Secretary to use contract authority for the operating subsidy program, but intended to vest her with discretion in allocating the authority among various Section 236 programs. The issue becomes whether the Secretary has properly exercised her discretion not to allocate any contract authority to this program.

The Secretary contends that Congress, in the committee reports accompanying the two appropriation acts noted above, directed her to use existing contract authority for interest reduction payments and mortgage insurance, the "production subsidy" programs under Section 236. While

priations act might be construed to constitute such a direction, <sup>18</sup> the later authorization of use of prior contract authority for operating subsidies is in conflict with, and supersedes, those statements. <sup>19</sup> Furthermore, statements in the reports accompanying the supplemental appropriations act to the effect that "...the Department utilize available resources for the Section 236 program at the earliest date to meet the need for lower income housing, "<sup>20</sup> referred to by the Secretary, cannot be construed to refer solely to housing production in view of the fact that the needs of lower income persons include the need to maintain rents in existing projects within their income range.

More revealing of the congressional attitude towards suspension of Section 236 programs by the Secretary is the congressional response to the Secretary's suspension of all Section 235 and 236 programs on January 5, 1973. The Secretary had determined that these programs were not serving the Congressional purpose and were frustrating the national housing policies applicable to all housing programs. In Commonwealth of Pennsylvania v. Lynn, 501 F.2d 848 (D.C.Cir. 1974), the District of Columbia Court of Appeals ruled that the Secretary had narrow discretion to suspend the programs under such circumstances and found that the Secretary had not abused his discretion in view

of structural problems perceived in the programs. The congressional response was a rejection of the Secretary's basic contention that he had discretion to refuse implementation of the program for the reasons given. Congress directed that the programs be implemented regardless of asserted defects until legislative changes could be made. 21 This experience indicates that Congress would not be receptive to the Secretary's refusal to implement the operating subsidies program because of perceived "inequities" and lack of comprehensiveness in the structure of the program. It was precisely this "policy distaste" which Congress stated was an improper basis for the 1973 suspensions. Therefore, to the extent that the Secretary's refusal to use existing contract authority for the operating subsidy program rests on disagreement with the effectiveness or wisdom of the program, that refusal constitutes an abuse of discretion. Dubose v. Hills, supra; Ross v. Community Services, Inc., supra.

In addition to the policy reasons given by the Secretary for not committing existing contract authority to the program, the Secretary has stated that her decision is also based on the fact that bona fide commitments to the interest reduction and deep subsidy programs have exhausted the existing authority. While it is not the perogative of the judiciary to interfere with the Secretary's allocation of contract authority based upon

legitimate considerations and a proper consideration of statutory duties, allocation of that authority based upon a misconception of statutory duties constitutes an abuse of discretion. Therefore, this justification for refusal to commit existing contract authority is without merit, and the Secretary must reconsider the priorities among Section 236 programs in light of the mandatory duties under Section 236(f)(3) declared herein.

V

The conclusions reached with respect to the merits of plaintiff's claim may be summarized as follows. First, the Secretary has a mandatory duty to establish the initial operating expense level under Section 236(f)(3).

Second, the Secretary has a mandatory duty to make the assistance payments authorized in Section 236(f)(3) if:

(1) she finds the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community; and (2) she determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments. She will be directed to make these determinations.

With respect to the latter determination, the

Secretary has stated through the Director of the Office of

Budget of the Department of Housing and Urban Development

that as of August 31, 1975, the balance in the reserve fund

was \$37,823,293.<sup>23</sup> The Secretary has further stated that the operating subsidy program for the entire Fiscal Year 1976 would require approximately \$51,400,000.<sup>24</sup> While the initial determination of adequacy must be made by the Secretary, it would appear that the balance in the reserve fund will be adequate at some point in Fiscal Year 1976.

Third, the Secretary should reconsider allocation of her existing contract authority in light of the statutory duties declared herein.

VI

In order to justify the issuance of a preliminary injunction, the movant has the burden of showing: (1) substantial probability of success at trial by the moving party; and (2) irreparable injury to the moving party absent such issuance. State of Nebraska, Department of Roads v. Tiemann, 510 F.2d 446 (8th Cir. 1975); Minnesota Bearing Company v. White Motor Corporation, 470 F.2d 1323 (8th Cir. 1973). Other factors which may be considered are the absence of substantial harm to other interested parties, and the absence of harm to the public interest.

Minnesota Bearing Company v. White Motor Corporation, supra.

The conclusions reached with respect to the merits of plaintiffs' claim demonstrate the substantial likelihood of success on the merits required. In the absence of a preliminary injunction, the plaintiffs' have irreparable injury from having to pay amounts substantially in excess

of 30 percent of their incomes for rent, a predicament which has already forced a number of tenants to abandon the project. The public interest will be served by requiring defendants to follow the law especially in view of the strong public interest in the National Housing Act expressed by Congress. Finally, defendants will not be harmed by issuance of the preliminary injunction because any assistance payments made can come from the reserve fund which cannot be used for any other purpose.

plaintiffs will be directed to post a nominal bond as security for the issuance of this preliminary injunction in accordance with Rule 65(c) of the Federal Rules of Civil Procedure. A larger bond is not deemed necessary in view of the fact that defendant is represented by government counsel.

For the foregoing reasons, it is therefore

ORDERED that the above-entitled action be, and it
is hereby, determined to be properly maintainable as a
class action under Rule 23(b)(2) of the Federal Rules of
Civil Procedure with the class composed of all persons
currently residing at Charlie Parker Square Homes who are
eligible for operating subsidies under Section 236(f)(3)
of the National Housing Act. It is further

ORDERED that counsel for plaintiff be, and they are hereby, directed to prepare and submit to the Court for approval a notice to class members advising them of

this action. It is further

ORDERED that the Secretary of Housing and Urban

Development and other federal defendants be, and they are

hereby commanded to establish the initial operating expense

level for the Charlie Parker Square Homes in accordance

with Section 236(f)(3) of the National Housing Act. It

is further

enjoined and restrained from refusing to exercise her discretion with respect to: (1) the reasonableness and comparability of increases in property taxes and utilities at Charlie Parker Square Homes as mandated by Section 236(f)(3) of the National Housing Act; and (2) the adequacy of the excess rental charges reserve fund to meet the estimated assistance payments, to make assistance payments under Section 236(f)(3) to Charlie Parker Square Homes if those determinations are made in plaintiff's favor, as soon as practicable but in no event later than 60 days from the date of this order unless otherwise ordered. It is further

ORDERED that plaintiffs be, and they are hereby, directed to post a nominal bond of \$100 as a condition for issuance of this preliminary injunction.

Kansas City, Missouri Date: /- 27.76 William H. Becker Chief Judge

## FOOTNOTES

- The private defendants are the Twelfth and Vine Housing Corporation, Inc., owner-mortgagor of Parker Square Homes; Hughes Development Company, Inc., managing agent of Twelfth and Vine Housing Corporation, Inc.; and officers of both.
- 2. Plaintiffs also seek review of administrative decisions of HUD authorizing defendent Twelfth and Vine Housing Corporation, Inc., to convert to direct billing of electric utilities and charge higher permissible rents. A preliminary injunction with respect to this claim was entered on January 13, 1976, and thus this claim will not be considered herein.
- 3. Sections 1331, 1336, 1337, 1361, Title 28, United States Code; Sections 701-706, Title 5, United States Code.
- 4. United States v. Emory, 314 U.S. 423, 430, 62 S.Ct. 317, 86 L.Ed. 315 (1941).
- 5. Section 1337, Title 28, United States Code, provides:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

- The legislative history of Section 236 is reported in 1968 U.S. Code, Congressional and Administrative News, p. 2873.
- 7. Section 1715z-1(i)(2), Title 12, United States Code.
- Section 1715z-1(f)(1) and (2), Title 12, United States Code.
- Sections 1715z-1(f)(3) and (g), Title 12, United States Code.
- 10. Sections 236(f)(3) and (g) as amended by Section 212 of the Housing and Community Development Act of 1974, Sections 1715z-1(f)(3) and (g), Title 12, United States Code, provide:
  - "(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost

of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customery vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes, is reasonable and is comparable to cost increases affecting other rental projects in the community.

> "Collection and deposit of excess rental charges for reserve fund for additional assistance payments; availability; establishment of initial operating expense level of assisted project

"(g) The project owner shall, as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in

the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974."

- 11. The pertinent provisions of the "deep subsidy" program of Section 236(f)(2) of the National Housing Act, Section 1715z(f)(2), Title 12, United States Code, provide:
  - "(2) With respect to 20 per centum of the dwelling units in any project made subject to a contract under this section after August 22, 1974, the Secretary shall make, and contract to make, additional assistance payments to the project owner on behalf of tenants whose incomes are too low for them to afford the basic rentals with 25 per centum of their income or such lower per centum as may be established pursuant to the provisions of clause (ii) of the last sentence of paragraph (1)."
- 12. S. Rep. No. 93-693, 93rd Cong., 2nd Sess. (1974), reprinted in 1974 U.S. Code Congressional and Administrative News, pp. 4303-4305, states in pertinent part:

"The Committee was concerned with the problem experienced by projects where costs rise above those initially projected.

Under the present program, there is no way of adjusting the subsidy to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments. While anxious to deal with this

problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor manage-

"Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, maintenance,\* and local property taxes, taking into account anticipated and customery vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A), the amount by which the sum of the cost of utilities, maintenance, and local property taxes exceeds the initial operating expense level, or (F amount required to insure that the basic lent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community.

"Under the current law, where tenants in a project are able to pay more than the basic rent the excess is returned to the Federal Government and may be used for the production subsidy now authorized. The Committee feels that it would be more appropriate if the 'excess' funds derived from project operations were made available for the making of the additional assistance payments to offset operating costs. Accordingly, the bill provides that such excess rentals shall be credited to a fund which may be used by the Secretary for making the additional payments based on initial operating expense ratios, as described above. This provision would also be applied to projects in the current section 236 program. For these existing projects, it is expected that

<sup>\*</sup>Note: Maintenance costs were excluded from the final bill.

the Secretary would establish the 'initial' ratios as of a date not later than 180 Cays after enactment of the bill."

See also the concern expressed by the House Committee on Banking and Currency in H. R. Rep. No. 93-1114, 93rd Cong., 2nd Sess. 21 (1974):

"One of the problems with the section 236 rental assistance program is that the amount of the subsidy is fixed for forty years. Thus as real estate taxes and other operating costs increase at a rate faster than the incomes of tenants, rents must be increased until at some point the project becomes economicall, unfeasible, vacancies mount, and the project fails."

13. Conference Report No. 93-1279, 93rd Cong., 2nd Sess. (1974), reprinted at 1974 U.S. Code, Congressional and Administrative News 4449, provides in pertinent part:

> "The Senate bill contained a provision not in the House amendment authorizing increased subsidies to existing and new section 236 projects to meet higher operating costs resulting from increased taxes, utility costs, and operating expenses. The conference report contains the Senate provision with an amendment authorizing the increased subsidies only with respect to higher operating costs resulting from increased taxes and utility costs. The conferees wish to point out that the specific amount of such increased subsidies should be determined by the Secretary taking into account the need to encourage reasonable economies in the operation of projects." Id. at 4475.

- S. Rep. No. 93-693; H. R. Rep. No. 93-1114; note 12, supra.
- 15. Section 236(i) of the National Housing Act as amended by Section 212 of the Housing and Community Development Act of 1974, Section 1715z-1(i)(1), Title 12, United States Code, provides:

"There are authorized to be appropriated such sums as may be necessary to carry out

the provisions of this section, including such sums as may be necessary to make interest reduction payments under contracts entered into by the Secretary under this section. The aggregate amount of outstanding contracts to make such payments shall not exceed amounts approved in appropriation acts, and payments pursuant to such contracts shall not exceed \$75,000,000 per annum prior to July 1, 1969, which maximum dollar amount shall be increased by... \$75,000,000 on July 1, 1974."

16. Pub. L. 93-414 (September 6, 1974) appropriated \$2,300,000,000 but restricted use of such funds under Section 236 to making interest reduction payments.

Pub. L. 93-554 (December 27, 1974) made no new appropriations for Section 236 programs.

17. In the Conference Report accompanying Pub. L. 93-414, Conf. Report H.R. No. 93-1310, 93rd Cong., 2nd Sess. 6 (1974), it was stated:

"...the provisions relating to operating cost subsidies in the new Section 236 program authorized by the Housing and Community Development Act of 1974 shall not apply to the unused balances of outstanding contract authority that may be committed to new projects pursuant to this act."

However, in Sen. R. No. 93-1255, 93rd Cong., 2nd Sess. 8 (1974), accompanying the supplemental appropriation Act, Pub. L. 93-554, the Senate Appropriations Committee stated, in pertinent part:

"The Committee wishes to clarify the intent in the joint explanatory statement of the Committee of Conference on H.R. 15572 with respect to the use of operating cost subsidies for Section 236 projects that the Secretary is authorized to use available contract authority for operating subsidies for existing or new Section 236 projects."

The Conference Report accompanying Pub. L. 93-554, Conference Report No. 93-1503, 93rd Cong., 2nd Sess. 5 (1974), states that "...the conferees are agreed as to the clarifying intent of the language in the Senate report relating to the utilization of operating subsidies for Section 236 projects."

18. In H.R. Rep. 93-1139, 93rd Cong. 2nd Sess. (1974), accompanying Pub. L. 93-414, Congress agreed to appropriate funds requested by HUD to expand another housing program on the condition that unusual Section 236 funds be used:

"The Committee directs that none of these funds be used to administer the new Section 23 revised leasing program without the companion administration and implementation of the full unused balance of Section 236 contract authority currently available. This can expedite necessary housing production for lower income families...." Id., at 7.

The Conference Committee specifically stated that unused Section 236 contract authority was not to be used for operating cost subsidies. Conf. Rep. H.R. No. 93-1310, note 17, <a href="mailto:supra">supra</a>.

- Sen. R. No. 93-1255, Conf. Rep. H.R. No. 93-1310, note 17, <u>supra</u>.
- S. Rep. No. 93-1255, note 17, <u>supra</u>, at 8. Conf. Report, H.R. Rep. No. 93-1503, note 17, <u>supra</u>, at 5.
- 21. The Senate Committee on Appropriations in S. Rep. No. 93-1056, 93rd Cong., 2nd Sess. 6-7 (1974), stated:

"The Committee is distressed and concerned by the Administration's action to abandon our nation's historic housing program.

"The Committee feels that the Administration has justified its actions for a variety of unsupported reasons. Among other things, it has claimed that the programs were not achieving the goals set by the Congress, but by no stretch of the imagination is that correct.

"Public housing, for all its particular difficulties, is highly popular and a badly needed program. The waiting lists are exceedingly long. The vacancy rates are exceedingly low. Thus it may be concluded that public housing provides, better housing

to millions of Americans than they could otherwise afford or are now getting.

"The Sections 235 and 236 programs suffered from both HUD mismanagement, and actual corruption, rather from any inherent defects in the programs. In cities with good HUD management, such as Milwaukee, the program was a great success. In cities with rampant corruption among housing officials, it, along with other HUD programs, failed. But the failures in certain cities were peculiar to Sections 235 and 236 and, in fact, these programs were not the main ones affected or which failed, contrary to the opinion of the Department and some judicial mistakes of fact. The Department blamed the programs instead of its own mismanagement.

"The Department has argued that if not everyone could be subsidized under the [Section 235] program, no one should be subsidized. Evidently, they halted the program out of policy distaste rather than from factual evidence.

"We are now awaiting action for new and substitute programs.

"The Department now wishes to rely entirely on what is called the new Section 23 program, a program of leased housing to replace the conventional public housing program, and Sections 235 and 236.

"The Committee feels that it would be a tragic error to take this course....

"...we should not accept the abandonment of the traditional programs as the price for Section 23. The traditional programs and Section 23 should be implemented concurrently."

The above statement is also found in S. Rep. No. 93-1091, 93rd Cong. 2nd Sess. 6-7 (1974).

- 22. Affidavit of Carla A. Hills, attached to "Supplemented Suggestions In Support of Federal Defendants' Motion For Summary Judgment As to Plaintiffs' First Cause of Action" filed January 2, 1976.
- 23. Affidavit of Albert J. Kliman, attached as Exhibit 2 to Sipulation filed November 18, 1975.
- 24. Note 22, supra.

CASHIN SILOT.

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EXHIBIT H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

TERRY HARRISON and JOYCE PORTER individually and on behalf of all others similarly situated, plaintiffs

CARLA HILLS, individually and in her capacity as Secretary of the Department of Housing and Urban Development, H. R. CRAWFORD, individually and in his capacity as Assistant Secretary for Housing Management of the Department of Housing and Urban Development; and CHARLES LIEBERTH, individually and in his capacity as Area Director of the Pittsburgh Office of the Department of Housing and Urban Development,

) CIVIL ACTION 75-938

CAMBRIDGE SQUARE APARTMENTS, a limited partnership,

Defendants

GENE CLICK MANAGEMENT CORPORATION, an Indiana Corporation.

OPINION

ROSENBERG, DISTRICT JUDGE

The matter presently before me is a request by the plaintiffs for a preliminary injunction prohibiting a federal

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agency defendant from refusing to release and make available funds to a private defendant to alleviate the need for a rent increase.

The plaintiffs, Terry Harrison and Joyce Porter, as tenants, have brought this action against the Secretary of the Department of Housing and Urban Development et al. (HUD), the federal defendant, to establish an initial operating expense level and pay over to the private defendants, the project owner, Cambridge Square Apartments, located in Monroeville, Pennsylvania, and Gene Glick Management Corporation of Indianapolis, Indiana, amounts of money that should have been accumulated pursuant to §212 of the Housing & Community Development Act of 1974 (12 U.S.C. §1715(f)(3) and (g). As of the present time I make no declaration relating to a class action and I am now proceeding only on the motion of the plaintiffs for a preliminary injunction.

The plaintiff, Terry Harrison, resides with her three minor children in a three-bedroom apartment at the project in question. While the rent due for the same apartment was \$159.00

monthly when she moved in, her obligation now is \$180.00 monthly plus a monthly \$20.00 electric bill. The plaintiff Harrison's only income is a monthly amount of \$331.00 as public assistance and \$60.00 of that goes for the purchase of food stamps.

The plaintiff, Joyce Porter, also resides with her four minor children in a three-bedroom apartment at the project in question. The plaintiff Porter's rent is presently \$180.00 monthly plus \$26.00 monthly for electric. The plaintiff Porter's only source of income is a monthly \$378.00 as public assistance, and \$90.00 of that is applied to the purchase of food stamps.

The two plaintiffs received notice on or about June 27, 1975 that an application was to be filed by the private defendants for approval from HUD to raise their respective rents \$8.00 per month commencing on September 1st to \$188.00. On or about July 30th approval was given for such an increase. The plaintiffs complain that they cannot afford any increase whatsoever and that this increase will deprive them and their families of bare necessities of life and will make their living more burdensome because of the meagerness of funds, particularly for the purchase of food and clothes.

The private defendants, the owner of the project and the managing corporation, argue that it is hard-put to obtain the slightest amount of return on its investment with its present income from the project and is required to procure more funds for the payment of electricity, gas, water, sewer, labor costs and increased operating expenses. The private defendants also argue that if they are deprived of the rental increase then the Secretary should be compelled to underwrite the additional costs that the project owner has inured.

I should emphasize at this point that (1) counsel have not contested the fact that the private defendants operate a low-income housing project qualifying them for benefits under §236 of the National Housing Act, 12 U.S.C. §1715z-1; and (2) counsel have stipulated that in no way are the increases in expenses for the project owner unjustified. The private defendants have complied with all HUD directives to obtain rent increases in the past and have so now. The only question before me is whether the plaintiffs, as tenants, should shoulder the burden of the increase or whether HUD is mandated to do so.

HUD argues against injunctive relief and maintains that

(1) the words of §212 of the Housing & Community Development Act of

1974, 12 U.S.C. 1715z-1(f)(3) and (g), do not compel the Secretary

to establish an operating expense level and in fact she has not

done so; (2) although Congress has authorized money for §212 housing

it appropriated none; and (3) the rental increase has not created an irreparable harm for the plaintiffs because of its minimal amount. Accordingly, the Government cannot be compelled to disperse funds to cover this rent increase.

In 1974 the Housing & Community Development Act, P.L.93-383
88 Stat. 633 was enacted by Congress. Section 212 of the Act amended in part §236 of the National Housing Act, 12 U.S.C. §1715z-1. The pertinent sections are as follows:

"(f)(3) For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account anticipated and customary vacancy rates. At any time subsequent to the establishment of an initial operating expenses level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local property taxes exceeds the initial operating expense level, but not to exceed the amount required to maintain the basic rentals of any units at levels not in excess of 30 per centum, or such lower per centum not less than 25 per centum as shall reflect the reduction permitted in clause (ii) of the last sentence of paragraph (1), of the income of tenants occupying such units. Any contract to make additional assistance payments may be amended periodically to provide for appropriate adjustments in the amount of the assistance payments. Additional assistance payments shall be made pursuant to this paragraph only if the Secretary finds that the increase in the cost of utilities or local property taxes is reasonable and is comparable to cost increases affecting other rental projects in the community.'

"(g) The project owner shall as required by the Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges collected in excess of the basic rental charges. Such excess charges shall be credited to a reserve fund to be used by the Secretary to make additional assistance payments as provided in paragraph (3) of subsection (f) of this section. During any period that the Secretary determines that the balance in the reserve fund is adequate to meet the estimated additional assistance payments, such excess charges shall be credited to the appropriation authorized by subsection (i) of this section and shall be available until the end of the next fiscal year for the purpose of making assistance payments with respect to rental housing projects receiving assistance under this section. For the purpose of this subsection and paragraph (3) of subsection (f) of this section, the initial operating expense level for any project assisted under a contract entered into prior to August 22, 1974, shall be established by the Secretary not later than 180 days after August 22, 1974."

The purpose of these amendments was reported by the Senate from which the final bill was enacted. S.Rep. No. 93-693, 93rd Cong. 2nd Sess. (1974) reported in 3 U.S.Code, Cong. & Adm. News, 4273, 4302.

Act and grows out of the existing rental nothing assistance program (section 236 of the National Rousing Act). However while it retains features of existing law, it also contains numerous improvements in that law so as to be in many ways, a new program rather than a simple continuation of the old. It is believed that these changes - including provisions to promote a mix of families with more widely varying income levels and to prevent excessive rent increases and assist sponsors in meeting increases in operating costs beyond their control - will eliminate a variety of problems and permit the program to operate more effectively in the future . . ."

As related above it was the intent of Congress to pass legislation that would "prevent excessive rent increase" and aid the project owner in operating a multidwelling where costs spiral out of control. Congress had in mind that two segments of the community (the project owner and the low income tenant) should receive benefits from the operating expenses level or the accumulation of excess rent charges.

HUD, however, believes that by its Secretary it is only authorized to establish such a fund and not mandated to do so. It argues that an entire program of housing can only be effective if the Secretary uses the funds that are at her disposal to benefit a broad program. She and the Department as a whole are permitted discretionally to distribute "pieces of the pie". HUD argues that Conress's intent is not clear as to whether they must establish the subsidy program or not.

Finding a foundation in the intent of Congress, I disagree with HUD's contentions. I look further at the Senate Report to find words which would create a mandate to set up these program subsidies:

"The Committee was concerned with the problem experienced by projects where costs rise above those initially projected. Under the present program, there is no way of adjusting the subsidy

to meet such costs, with the result that the burden falls upon lower income tenants, who may thus be required to pay far more than 25 percent of their incomes for their apartments. While anxious to deal with this problem, however, the Committee also of course desired to develop a provision which would focus upon the real problem cases and could be tightly administered and would not simply reward poor management.

Accordingly, the bill provides that for each project there would be established an initial operating expense level equal to the sum of the cost of utilities, maintenance, and local property taxes, taking into account anticipated and customary vacancy rates. On the basis of this initial level, the Secretary would be authorized to provide additional assistance payments in problem cases where needed to offset increases in the costs covered. These additional payments could not exceed the lesser of (A), the amount by which the sum of the cost of utilities, maintenance and local property taxes exceeds the initial operating expenses level, or (B) the amount required to insure that the basic rent of any unit does not exceed 30 percent of the income of the tenant occupying such unit. Additional operating assistance payments could only be made where the increase in the cost item involved is reasonable and comparable to cost increases affecting other rental projects in the community:" (Senate Report, supre, pages 4303-4304).

Specifically, the phrase, "the bill provides that for each project there would be established an initial operating expense level" emphasizes the fact that Congress was looking past the enactment of the Act and to the instigation by the Secretary of

subsidy funds which would aid the plaintiffs and project owner to prevent the instant action from ever occurring.

While the word "authority" is employed within subsection (f)(3) of the Act, it is used by Congress to give the Secretary explicit power to make payments and to contract to make payments to the project owner directly. This would limit he authority of others to issue such payments and create a lesser chance for abuses within the program. This is not what HUD contends the meaning of the Secretary's authority is. I find it is from the reading of the statute and the Congressional intent.

Each subsection, (f)(3) and (g), use the word "shall" in (1) establishing an operating expense level and (2) establishing an excess rent reserve fund. The vords of Congress would be actually nil if the Secretary who is authorized to disperse the funds uses her sole discretion in applying them to situations contemplated by the Congress. The Congress did not establish restrictive use of the funds as long as the general requirements of the Act were met. In this action the plaintiffs and the project owners fall into the specific categories there provided. Congress did not intend the plaintiffs' difficulty to hinge upon the discretion of the Secretary. This is clear and not confusing as the federal defendants would suggest, for if the Secretary were to permit the program to deteriorate by not exercising her authority

she would in effect be legislating her own policies.

The plaintiffs rely heavily upon Ross et al. v. Community

Services, Inc. et al., Civil No. H-75-506, F.Supp. (D.C.Md.

1975). The case that was before Judge Harvey is directly on

point. The plaintiffs were low income tenants living in federally
subsidized housing. There was a rent increase and HUD had refused
to establish the funds in question here to cover justified
increased utility costs. In Ross, supra, Judge Harvey said:

"The very situation envisoned by Congress has occurred here. Increased operating costs at Uplands have resulted in increased rents, which the record shows are entirely justified. Yet the low income tenants affected are unable to pay all or a part of such increased rents and may now face eviction. It was precisely this problem which led Congress to pass the 1974 amendments and to direct the Secretary of HUD to set aside excess rentals collected to pay operating subsidies where the conditions of the statute were met. Such subsidies inure, of course, to the benefit of the low income tenants.

But in the face of this Congressional intent, what has been HUD's approach? Simply put, HUD has adopted the position that it will not implement the program in any way. Claiming that it has been given broad discretion by Congress to make these payments, HUD has decided that it will exercise such discretion to make no payments at all to any projects at any time, whether worthy or not and whether the project might fully qualify under the Congressional standards or not." (Page 10 of the Opinion).

Judge Harvey further held:

"I find on the record here that the federal defendants acted contrary to the requirements of Section 236(f)(3) and (g) when they refused to even consider whether under the circumstances of this case the private defendants were entitled or not to receive operating subsidies and whether the plaintiffs were entitled to the benefit of such subsidies. I will therefore order the federal defendants to comply with the law." (Page 12 of the Opinion).

HUD contends that although money for the program has been authorized by Congress, it has not been appropriated and therefore it does not have to act. Congress has authorized monies for this program. It intended that:

"Since both the section 236 and the Rent Supplement programs are included in the new section 502 program there is no longer a need for separate authorizations. The Committee has provided \$180,000,000 of new money for section 502 and this will be available on July 1, 1974. Added to this new authorization is the \$50,000,000 to carry over from the old Rent Supplement program. Thus for fiscal year 1975 there is authorized a total of \$230,000,000 and for the fiscal year 1976 the Committee has authorized an additional \$200,000;000 which will become available on July 1, 1975." (Senate Report, supra, at page 4304).

It is the duty of MUD, not the individual, to procure from Congress needed appropriation of monies authorized for this program. The Secretary is the designated intermediary between Congress and low income tenants. The program is there. MUD must

act on the whole; and where it has committed itself on the half and obligated itself to pay funds, it will not be heard to say that performance on the other half is discretionary and it does not have to pay the funds.

MUD also argues that the plaintiffs suffer no irreparable harm to enable them to obtain a preliminary injunction. Eight Dollars is not a large sum when taken out of context. But when persons are on limited budgets, as the plaintiffs are, and the very necessities of life are barely provided, an increase, no matter how small, in monthly expenses could lead to disaster. The fact that such an increase could eventually cause a person to leave the project and look for a less expensive place to live in a less desirable environment must be taken into account by the impact it would have upon a family trying to keep their heads above water. What may now be only a minimal increase could precipitate an evidtion. Keller v. Kale Maremount Foundation, 365 F. Supp. 798, 802, 803 (D.C.N.D.Cal. 1972). The plaintiffs have emphasized that this is the third rent increase since they have been tenants. Neither defendants deny this. While only a 4.4% increase is indicated at the present, the total effect has been a 16.1% increase. The total picture is thus much more severe.

Because I have found that (1) any increase in the plaintiffs' rent caused by inflated utility costs would produce irreparable harm, and (2) NUD is not performing its duties,

granting the plaintiffs a likelihood of success on the merits, the plaintiffs are entitled to a preliminary injunction for the purpose of maintaining the status quo between the parties.

In the instant action, NUD has authorized three rent increases during the past two years at the bequest of the private defendants. If HUD has the authority to authorize such increases and is given directions of Congress to establish special subsidy funds for that exact purpose, it is beyond reason why the latter should not be initiated by the Secretary. Spiraling costs have placed a burden upon the project owner who gets relief from HUD when HUD feels that rent increases are justified. A rent increase, if justified, also justifies the distribution of subsidy funds for those under the protection of Congress.

At this point it appears that the plaintiffs will be successful after a final hearing. This is not an absolute and the parties will be permitted to exhaust whatever discovery they require for the purpose of having a full and complete hearing for a final determination of the questions raised. During this time a preliminary injunction will issue to the plaintiff enjoining the private defendants from collecting any increase in rent due to inflated utility costs or increased taxes, specifically those intended by Congress in §212 of the Housing and Community Development Act of 1974.

## ORDER OF COURT

AND NOW, TO-WIT, this 1st day of Orling 1975

for the reasons set forth in the foregoing Opinion, the plaintiffs' request for a preliminary injunction is thereby granted.

United States District Judge

cc: Frank I. Smizik, Esq. 310 Plaza Building 535 Fifth Avenue Pittsburgh, Penna. 15219

Rex E. Lee, Assistant Attorney General Stanley D. Rose, Esq. David Epstein, Esq. Paul T. Michael, Esq. Department of Justice Washington, D.C.

Henry G. Barr, Assistant United States Attorney 633 U.S.P.O. & Courthouse Pittsburgh, Penna. 15219 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENESYLVANIA

TERRY MARRISON et al.,

Plaintiffs

Civil Action 75-938

CARLA HILLS, ET AL.,

Defendants

FINDINGS OF FACT and CONCLUSIONS OF IAW

ROSENBERG, DISTRICT JUDGE

- 1. The plaintiff, Terry Harrison, resides in a three-bedroom apartment with her three children in the Cambridge Square Apartments located at 229A Cambridge Square Drive, Monroeville, Pennsylvania.
- 2. The plaintiff, Joyce Porter, resides in a three-bedroom apartment with her four children in the Cambridge Square Apartments located at 213 Cambridge Square Drive, Apartment 11, Monroeville, Pennsylvania.
- 3. The defendant, Carla A. Hills, is the Secretary of the United States Department of Housing and Urban Development (NUD) with her official place of residence being Washington, D.C.
- 4. The defendant, H. R. Crawford, is the Assistant
  Secretary of HUD for Housing Managment with his official residence
  located in Washington, D.C.
- 5. The defendant, Charles Fieberth, is the Area Director of NUD's Pittsburgh Area Office with his official residence located in Nashington, D.C.

- 6. The defendant, Cambridge Square Apartments, a limited partnership, is a limited partnership exeated and existing under the laws of the State of Indiana. The defendant, Cambridge Square Apartments is the owner of the Cambridge Square Apartments which is located in Monroeville, Pennsylvania.
- 7. The defendant, Gene Glick Management Corporation, is a corporation that exists under the laws of the State of Indiana, and is the management agent of the Cambridge Square Apartments.
- 8. The Cambridge Square Apartments complex was financed under a mortgage insured pursuant to 12 U.S.C. §1715z-1.
- 9. The defendant, Cambridge Square Apartments, a limited partnership, receives financial assistance payments from HUD pursuant to 12 U.S.C. §1715z-1, in order to reduce the interest payments on the mortgage of the Cambridge Square Apartments to an effective rate of 1% per annum.
- 10. Pursuant to a regulatory agreement entered into with MUD, the defendant Cambridge Square Apartments, a limited partnership, agrees to charge a rental to each of the tenants residing in the Cambridge Square Apartments that amounts to 25% of the tenant's

gross income or the basic rental, whichever is greater, but in no event to exceed the fair market rental.

- 11. Pursuant to the regulatory agreement entered into with HUD, the defendant, Cambridge Square Apartments, a limited partnership, further agrees to charge the tenants residing in the Cambridge Square Apartments only those rentals approved by HUD.
- 12. Prior to September 1, 1975, each of the plaintiffs
  paid \$180.00 per month in rent for their apartments located in the
  Cambridge Square Apartments.
- 13. On or about June 27, 1975, the defendants, Cambridge Square Apartments, a limited partnership, and Gene Glick Management Corporation posted notice at the Cambridge Square Apartments complex which stated that the monthly rental for three-bedroom apartments would be increased from \$180.00 to \$188.00.
- 14. On or about June 27, 1975, the defendants, Cambridge Square Apartments, a limited partnership, and Gene Glick Management Corporation, applied to MUD and requested, among other things, that they be allowed to raise the rentals on three-bedroom apartments from \$180.00 to \$188.00 per month. On or about July 30, 1975, MUD approved this request for a rental increase.

- 15. The request to increase the rentals on three-bedroom apartments located at the Cambridge Square Apartments complex was based on increased costs in utilities, labor rates and other operating expenses.
- 16. On or about July 31, 1975, both of the plaintiffs were notified that their rent would be increased from \$180.00 to \$188.00 per month on September 1, 1975.
- 17. The proposed rent increase for Cambridge Square is the third in less than two years and is primarily a result of utility increases. While the proposed increase is 4.4%, the total would represent a 16.1% increase.
- 18. The Housing and Community Development Act of 1974 was passed and became effective on August 22, 1974. Sections 212 (f)(3) and (g) further amended the Housing Act of 1968 specifically Section 236.
- 19. Sections 212(f)(3) and (g) provide for additional "operating subsidies" to FHA 236 projects. These subsidies are over and above the interest reduction payments given to mortgagess. Cambridge Square Apartments is eligible to receive these subsidies.

- 20. HUD has refused to implement any portion of the "operating subsidy" program both locally and nationally, including the establishment of an active operating expense level, or even determining if projects are eligible for subsidies.
- 21. The defendant, Cambridge Square, has not applied for these operating subsidies and that the defendant, HUD, has not provided a vehicle for the defendant, Cambridge Square, to apply.
- 22. As a result no additional subsidies are being paid to Cambridge Square and the rent increase is scheduled to go into effect, despite a mandatory government program to remove the burdens for increased costs from the tenant.

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## CONCLUSIONS OF LAW

- 1. Sections 212(f)(3) and (g) of the Housing and Community.

  Development Act of 1974 are a manifestation of Congress's intent to alleviate the need for rent raises due to increases in utility costs and taxes.
- 2. It is incumbent upon the Secretary to establish an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes.
- 3. It is mandatory upon the project owner to accumulate all excess rents collected above the basic rental charges and give them to the Secretary who shall credit these funds to a reserve fund which shall be available for the operating subsidy program.
- 4. It is the intent of the law to provide subsidies to projects such as Cambridge Square, who have tenants whose incomes are 80% of the median income of the area and whose tenants are paying more than 30% of their income for rent.
- 5. The language of the law not only requires that an initial operating expense level be established, but that after a reasonable time the Secretary is to determine if the project is eligible for increased subsidies as a result of utility and tax increases.
- 6. The Reserve Fund monies as set forth in Section 212(3) of the Housing and Community Development Act of 1974 are to be used only for the operating subsidies described in §212(f)(3).

- 7. It is not NUD's prerogative to disagree with

  Congressional policy and refuse to implement it. An administrative agency is required to effectuate not ignore Congressional intent, whether the agency agrees with Congress or not.
- 8. The increase in rent due to inflated utility costs will cause irreparable harm and injury to the plaintiffs. An award of damages cannot compensate the plaintiffs for the possible harm that will be caused.
- 9. The plaintiffs have no adequate remedy of law for the refusal of the federal defendants to implement programs authorized by Congress.
- 10. Greater injury will be suffered by the plaintiffs from the denial of a preliminary injunction than will be suffered by the defendants from its issuance.
- 11. From the evidence as presented, there is a reasonable likelihood that the plaintiffs will succeed at the final hearing on the merits.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVARIA

TERRY MARRISON and JOYCE PORTER, individually and on behalf of all others similarly situated,

Plaintiffs

vs.

CARLA HILLS, individually and in her capacity as Secretary of the Department of Housing and Urban Development,

H. R. CRAWFORD, individually and in his capacity as Assistant Secretary for Housing Management of the Department of Housing and Urban Development; and CHARLES LIEBERTH, individually and in his capacity as Area Director of the Pittsburgh Office of the Department of Housing and Urban Development,

No. 75 938

Defendants

vs.

CAMBRIDGE SQUARE APARTMENTS a limited partnership

Defendants

vs.

GENE CLICK MANAGEMENT CORPORATION, an Indiana Corporation,

Defendants

ORDER

AND NOW, to wit, this \_\_\_\_\_\_ day of October,

1975 following a hearing held on August 28, 1975, including
testimony and oral arguments by counsel for all parties it is
hereby ordered adjudged and decreed pursuant to Rule 65 (d)
of the Federal Rules of Civil Procedure:

1. That the defendant Gene Glick Corporation its agents or assigns, and all those acting on their behalf, be preliminarily enjoined from collecting any rent increase from the named plaintiffs at the Cambridge Square Apartments, and that they be further ordered to make application for an operating subsidy pursuant to Sections 212 (F) (3) and (g) of the Housing and Community Development Act of 1974.

- 2. It is decreed that the Cambridge Square Apartments, an FNA 236 Nousing Development, is eligible for operating subsidies as provided by Congress in the Nousing and Community Development Act of 1974.
- 3. It is further ordered and decreed, that the defendant Department of Housing and Urban Development immediately implement the provisions of §212.(f) (3) and (g) of the Housing and Community Development Act of 1974 as it applies to the Cambridge Square Apartments in the following manner:
  - Sct an initial operating expense level.
  - Determine the percentage of the rent increase necessitated by increases in taxes and utilities.
  - c. Determine all those tenants eligible, according to the provisions of the Housing and Community Development Act of 1974.
  - d. Determine the amount of subsidy as of August 22, 1974, the date of passage of the Housing and Community Development Act of 1974.
- 4. It is ordered that the Department of Housing and Urban Development shall as promptly as possible pay the amount of subsidy as required by law.
- and public defendants file appropriate motions to the contrary, this court will consolidate the preliminary and permanent injunction; the injunction will be made permanent and final and this court will establish the class designating, those eligible members.
- 6. Finally, this court will retain jurisdiction for any further proceedings necessary.

EXHIBIT I

CATHERINE M. BISHOF DEC 1 9 1275 National Housing and Econémic Development Law Project CHIEF U. S. DISTITUTE CONTRA 2 2313 Warring Street Berkeley, CA 94704 Berkeley, CA 94764 Telephone: (415) 642-2826 LODGED WILL ESNALD S. JAVOR
Legal Aid Foundation of Long Bodon
363 West Sixth Street Class U.S. Direct Of Causenia
San Feire, CA 92731
Telephone: (213) 531-0055 5 6 Atterneys for Plaintiffs 8 9 UNITED STATES DISTRICT COURT 10 FOR THE CENTRAL DISTRICT OF CALIFORNIA 11 12 HILDA ABRAMS, GRETA JAEGER, MARGARET MCEACHIN, individually, and as representatives of a class, 13 14 Plaintiffs, CIVIL ACTION 15 NO. 75-3009 JWC VS. 16 CARLA HILLS, as Secretary of the SECOND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW 17 United States Department of Housing and Urban Development, IN SUPPORT OF PLAIN-TIFFS' MEMORANDUM IN H. R. CRAWFORD, as Assistant 18 Secretary for Housing Management of the RESPONSE TO THE COURT'S REQUEST OF United States Department of Housing and Urban Development, ROLAND CANFIELD, as Director of the Los Angeles Area Office of the United States Depart-DECEMBER 4, 1975 20 ment of Housing and Urban Develop-ment, G & K MANAGEMENT CO., INC., 21 and MEYLER PARK APARTMENTS, a Limited 22 Partnership, 23 Defendants. 24 The above entitled cause, came on Plaintiffs' motion for 25 summary judgment and this Court having duly considered the memor-26 anda of law, affidavits, and exhibits, and being fully advised, 27

now finis the following:

## . FINDINGS OF FACT

1. The Plaintiffs, HILDA ABRAMS, GRETA JAEGER and 30 MARGARET McEACHIM, hereinafter "Plaintiffs," are residents of 31 the MEYLER PARK APARTMENTS, each of whom pay more than twenty-32

- five to thirty percent (25-30%) of their "adjusted family incomes" 2 in rent.
- 3 2. The class which Plaintiffs represent are past, present and future residents of the Meyler Park Apartments, each of whom pay more than twenty-five to thirty percent (25-301) of their
- 3. Defendants MEYLER PARK APARTMENTS, a Limited Partnership, and G & K MANAGEMENT COMPANY, INC., hereinafter, "private Defendants," are respectively, the owner and operators of the 9 MEYLER PARK APARTMENTS, a 99-unit Section 236 development in San 10

"adjusted family incomes" in rent.

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- Pedro, California. 12 4. Defendants CARLA HILLS, H. R. CRAWFORD, and ROLAND CAMFIELD, hereinafter "federal Defendants," are officials of 13 the United States Department of Housing and Urban Development, 15 hereinafter "HUD." Defendant Hills has overall responsibility for the administration and enforcement of all laws, regulations, 16 17 powers and duties pertaining to the operation of HUD and including the administration of the Section 236 program. Defendant 18 CRAWFORD is responsible, under the authority delegated to him 19 by Defendant Hills, for the management of housing projects con-20 structed under the National Housing Act and including Section 236 21 housing projects. Defendant CANFIELD is responsible, under the 22
- Section 236 program. 27 5. The Section 236 housing program is a part of the Mational Housing Act, added by the Housing and Development Act 23 29 of 1963 and designed for the purpose of reducing rentals of lowincome families who cannot otherwise afford decent housing.

authority delegated to him by Defendant Hills, for the adminis-

and procedures of HUD, in particular all those applicable to the

tration and enforcement in Southern California of laws, regulations

31 6. The federal Defendants are responsible for implement-32 ation of the Section 236 program, including issuing rules and

regulations purposent thereto, making periodic interest payments on behalf of qualified morthagons, and regulating project owners with respect to rent, rent increase procedures, and other operating procedures.

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- 7. The National Housing Act was further amended by the Housing and Community Development Act of 1974, hereinafter HCDA 1974, on August 18, 1974, adding Section 212(2)(3) and (3), hereinafter operating subsidy provisions.
- 5. The reserve fund referred to in Section 212(3) is available to federal Defendants for use as an operating subsidy and was valued as of August 31, 1975 at thirty eight million, three hundred ninety-three thousand, seven hundred twenty dollars (\$38,393,720.00).
- 9. Other funds for the implementation of the operating subsidy provision were appropriated on September 6,  $197^{4}$ , and such funds have not been entirely spent or obligated.
- 10. The MEYLER PARK APARTMENTS is a 99-unit lower-income housing complex in San Pedro, California, constructed and financed bursuant to Section 236.
- 11. Qualified tenants in MEYLER PARK APARTMENTS pay no more than twenty-five percent (25%) of their "adjusted family incomes" for rent up to "fair market value," or pay "basic rent," computed on the basis of the amortized mortgage, and operating costs, and approved by federal Defendants.
- 12. Applications for rent increases are submitted by the private Defendants to the federal Defendants and are approved if they provide reasonable charges to tenants and a fair return to the mortgagor. Such increases must be for demonstrated and bona fire increases in operating expenses and taxes, and sources of funds other than tenants' rent must be maximized.
- 13. Plaintiffs began their occupancy at the MEYLER PARK APARTMENTS in 1972 and 1973, paying rent at the initial rate

1 of \$105.32 per month. Their leases were first amended effective.

2 November 1, 1974 to increase the rent ten and eight-tenths per-

cent (10.8%) to \$116.00 per month. Said rent raise was attri-

buted at least in nart to increased utility costs and property

5 taxes.

in property taxes.

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14. On or about May 29, 1975, emivate Defendants notified Plaintiffs of their intention to apply to HUD for approval of a second rent increase, attributing said increase, at least in part, to a dramatic increase in utility costs and an increase

15. On or about July 1, 1975, private Defendants submitted to federal Defendants the request for a rent increase, which was approved by the federal Defendants because of the increased costs for all utilities, property taxes, and other operating costs.

16. On or about July 28, 1975, Plaintiffs were notified that the rent increase had been approved by the federal Defendants and that effective September 1, 1975, their rent would be increased to \$123.00 per month, a raise of ten and four tenths percent (10.4%).

17. An increase in plaintiffs' rent at time of twelve dollars (12.00) monthly will result in grave hardship to plaintiffs and a threat of eviction due to their inability to pay the increased rent and severe difficulty in providing themselves with the necessities of life from their disposable incomes.

18. Plaintiffs requested private Defendants to apply for additional assistance payments from the operating subsidy, and to federal Defendants to provide additional assistance payments under the operating subsidy program.

30 19. There have been increases in property taxes and
31 utilities at MEYLER FARK APARTMENTS since the date that the
32 apartment complex may be determined to be fully occupied which

have increased [ intiffs' rents by at least if not more than twelve dollars (\$12.00) per month, the amount of the present rent 2 increase. 3 20. Pursuant to the operating subsidy provision, private Defendants are elimible to receive additional assistance payments 5 on behalf of the Plaintif's and the class they represent. 21. Federal Defendants have not established an initial 7 operating expense level for the MEYLER PARK APARTMENTS, neither by February 18, 1975, not until the present. 22. The federal Defendants have not issued rules and rer-10 ulations implementing the operating subsidy provision, nor have 11. they accepted applications for additional assistance payments. 12 23. Federal Defendants have not made adultional assist-13 ance payments to private Defendants. 14 24. Contrary to the statute, the federal Defendants are 15 no longer requiring the private Defendants, and all of the Sez-16 tion 236 project owners, to return to the federal Defendants all 17 rent collected in excess of basic rent. 18 Transmitted Notice 24, whileh admids the line 19 Project Servicing Handbook, 4350.1, issued by the factor Defen-20 dants permits the private Defendants and all other Section 236 21 project owners to subtract from total rests collected the basic 22 rents and in addition collection losses. 23 26. As a result of the implementation of this regulation, 24 the reserve fund from which operating subsidies must be cald 25 is no longer according at the maximum rate. 28 inis regulation is contrary to the HCDA 1974, and 27 fates the purposes and intent of the operating subsidy pro-28 29 28. The federal Defendants are also contemplating using 30 31

the reserve fund for additional purposes other than the operating subsidy.

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29. The federal Defendants may not use the reserve fund for purposes other than the implementation of the operating subsidy unless the reserve funi is adequate to meet the estimated need for such additional assistance payments. funi is alequate to meet the needs protection subsidies, then the excess abavers from the reserve fund shall be credited A Tale and a train the such the Secolor Second Pres Private Defendants : request for a rent increas submitted and approved in violation of the rules and regulations of the federal Defendants. The requested increase was not con-10 sidered in light of the applicability and the private Defendants' 11 eligibility of the operating subsidy. Thus the costs justifying 12 Present inopease were not demonstrated on beneation 13 31. The matter in controversy exceeds the sum of 14 310,000.00 for each Plaintiff, exclusive of interest and costs, 15 in that the difference between the amount of rent Plaintiffs pay 16 and the fair market value of their units when spread over the 17 life of the mortgage represents a value to each Plaintiff exceed-18 ing ten thousand dollars (\$10,000.00). 19 CONCLUSIONS OF LAW 20 1. In all respects set forth in the foregoing Findings 21 of Fact: 22 2. The Court has jurisdiction of this action under 23 23 U.S. . 551331, 1337, 1361, and 5 U.S.C. \$702. Declaratory relief is authorized by 28 U.S.C. §\$2201 and 2202 and Rule 57 of Fed. 25 R.Civ.Pro. and by 5 U.S.C. §703. 26 3. The Court has jurisdiction over the parties to this 27 action. 23 4. The Plaintiffs, pursuant to Rule 23(a) and (b)(2) of 29 Ped.R.Civ.Pro. are representatives of a class of persons residing

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in MEYLER PARK APARTMENTS who have been paying, and will in the

future pay, a basic rent pursuant to 12 U.S.C. \$1715z-1 of more

- than twenty-five to thirty percent (25-30%) of their "adjusted family income."
- 5. The failure of federal Defendants to implement the aperating subridy program, and the lack of opportunity to receive the benefits of the operating subsidy has caused Plaintiffs and all those similarly situated great and irreparable injury, and has denied them their legal benefits.
- 4 6. The provisions of \$212(2)(3) and (3) of the Housing and Community Development Act of 1974, hereinafter operating sub-9 sidy, are mandatory upon the federal Defendants and they have 10 a ministerial duty to implement it. The operating subisdy pro-11 vides that for each Section 236 subsidized lower income housing 12 project, the federal Defendants shall establish an initial oper-13 ating expense level t. February 18, 1975. On the basis of this 14 15 initial level, the federal Defendants shall make additional assistance payments to Section 236 project owners to offset rea-16 17 sonable and comparable increases in property taxes and utilities. These additional assistance payments shall not exceed the amount 18 by which the sum of property taxes and utilities exceed the ini-19 tial operating expense level, nor shall it be greater than the 20 21 amount required to insure that the basic rent of any unit does not exceed twenty-five to thirty percent (25-30%) of the income 22 23 of the tenant occupying such unit.
  - 7. The thirty-eight million, three hundred ninety-three thousand, seven hundred twenty dollars (\$33,393,720.00) reserve fund referred to in \$212(3) shall be used by federal Defendants; to satisfy the need of operating subsidies before alternative uses may be considered. Upon depletion of that fund, the supplemental appropriation approved on September 6, 1974, shall be used to further satisfy the need for operating subsidy payments.

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1 missing missing regulations, which the normalisticans 2 the federal Defendants to review and approve rent increases only for demonstrated increases or bona fide expenses, ficluding maximining sources of income other than tengats rents. to inclement the operating substdy and determine the private 6 Defeniants' eligibility for additional assistance payments, the 7 federal Defendants failed to determine whether the rest increase 8 request was based upon demonstrated increases or bona fide ex-9 10 The failure of federal Defendants to implement the 11 operati.; subsidy program, and the lack of opportunity to receive 12 the benefits of the operating subsidy program has caused Plain-13 tiffs and all those similarly situated great and irreparable in-14 jury, and has denied them their legal benefits. 15 10. There exists between Plaintiffs and Defendants an

actual and present controversy, in that private Defendants have

17 been authorized by federal Defendants to implement and will im
18 plement a rent increase for the Plaintiffs with the PROVIDING.

Subsidy Payment As Required by

- 20 as amended by the Housing and Community Development Act of 1974 21 to provide for operating subsidy payments.
- 22 ll. Plaintiffs have no adequate remedy at law in that a
  23 money judgment cannot compensate Plaintiffs who must, in order to
  24 avoid eviction, stretch inadequate incomes and sacrifice other
  25 necessities in order to make rental payments which they are not
  26 statutorily obligated to make.
- 12. Plaintiffs are entitled to judgment declaring that
  the approval of the rent increase is illegal for failure of the
  federal Defendants and private Defendants to comply with the
  Kational Housing Act and rules and regulations promulgated pursuant thereto pertaining to the application for and approval of
  rent increase requests.

-8-

1 13. Plaintiffs are entitled to judgment declaring that
2 the federal Defendants must implement the operating subsidy pro3 vision of the Housing and Community Tevelorment Act of 1974 and
4 must establish an initial operating level for MEYLER PARK APART5 MENTS and make operating subsidy payments, and must continue to
6 make said payments retroactive to February 18, 1975, to private
7 Defendants to offset costs attributable to increases in property
8 taxes and utility costs above the initial operating expense level
9 which have created a rental equal to more than twenty-five to
10 thirty percent (25-30%) of Plaintiffs' "adjusted family incomes."

Defendance to comply with the purpose and intent of the National Housing Act and with existing rules and regulations promulgated thereto pertaining to the request for an approval of a rent increase for MEYPER PARK APARTMENTS.

Defendants to implement the operating subsidy provision of the Housing and Community Development Act of 1974 and to make operating subsidy payments retroactive to February 18, 1975, and to continue to make such payments to the private Defendants to offset costs attributable to increases in property taxes and utility costs above the initial operating expense level which have created a rental equal to more than twenty-five to thirty percent (25-30%) of Plaintiffs' "adjusted family incomes."

16. Plaintiffs are entitled to a permanent injunction ordering federal Defendants to work towards achieving the National Housing Act goal of a decent home and suitable living environment for every American family; to comply with their own duly adopted rules and regulations which provide that rint increase requests shall be approved only for "bora fide" and "demonstrated" increases; to consider alternative sources of the constrated of the consider alternative sources of the constrated of the constrated of the constraints of the constraints

sider in the future alternative sources of funds for MEYLER PARK 2 APINATURTS, especially at the time when requests for rent in-3 creases are submitted. 17. Plaintiffs are entitled to a permanent injunction enfein'ng the feleral Defendants from implementing Transmittal Notice 24 which amends the Insured Project Servicing Handbook 4350.1 or failing to assure in all other ways that the reserve fund accues at the maximum inte and from making payment from or 9 depleting the reserve fund for gurposes other than the imple-10 mentation of the operations 11 18. Plaintiffs are entitled to reasonable costs as against 12 the federal Defendants. 13 14 DATED: 12 1975 15 16 17 United/States District Court Central District, California 18 19 20 21 22 23 24 25 27 28 29 30 31

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CATHERINE M. BISHOP National Housing and Economic DEC 1 9/1975 Development Law Project CLERK, U. S. CHEPT 2313 Warring Street
Berkeley, CA 94704
Telephone: (415) 642-2820 CEITIPAL DISTRICT RONALD S. JAVOR **DEC 12 1975** 

Legal Aid Foundation of Long Beach
363 West Sixth Street CLERK D. OUTSING CHIEF CALIFORNIA
San Pedro, CA 90731 CENTRAL GRIENCE CALIFORNIA San Pedro, CA 90731 CENIR Telephone: (213) 831-8355

Attorneys for Plaintiffs

ENTERED

DEC 1 9 1975

CLERK, U. S. DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

HILDA ABRAMS, GRETA JAEGER, MARGARET McEACHIN, individually, and as representatives of a class,

Plaintiffs,

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CARLA HILLS, as Secretary of the United States Department of Housing and Urban Development, H. R. CPAWFORD, as Assistant Secretary for Housing Management of the United States Department of Housing and Urban Development, ROLAND CANFIELD, as Director of the Los Angeles Area Office of the United States Department of Housing and Urban Development, G & K MANAGEMENT CO., INC. and MEYLER PARK APARTMENTS, a limited partnership,

Defendants.

CIVIL ACTION NO. 75-3009 JWC

-PROPOSED ORDER IN SUPPORT OF PLAINTIFFS' MEMORANDUM IN RESPONSE TO THE COURT'S REQUEST OF DECEMBER 4, 1975

Upon consideration of the memoranda filed in the instant case and the oral arguments of counsel for all parties hereto and the Court having made certain findings of fact and conclusions of law under Federal Rules of Civil Procedure 52, and the Court having concluded that Plaintiffs motion for summary judgment is hereby granted and a preliminary and permanent injunction should be entered, it is on this 1975 day of December, 1975

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1. This Court properly has jurisdiction over this action under 28 U.S.C. §§1331, 1337, 1361 and 5 U.S.C. §702. Declaratory relief is authorized by 28 U.S.C. §§2201 and 2202 and Rule 57 of Federal Rules of Civil Procedure and by 5 U.S.C. §703.

2. The class of persons herein which Plaintiffs represent is certified as those tenants of MEYLER PARK APARTMENTS who pay basic rent as defined in 12 U.S.C. §1715z-1 which exceeds twenty-five percent (25%) of their "adjusted family income" for rent.

3. The Defendants, Hills, Crawford and Canfield, hereinafter federal Defendants, are hereby ordered to immediately implement Section 212(2)(3) and (3) of the Housing and Community Development Act of 1974, hereinafter operating subsidy provision, by establishing for MEYLER PARK APARTMENTS an initial operating expense level, and making additional assistance payments to the Defendants MEYLER PARK APARTMENTS, Ltd., and G & K MANAGEMENT CO., INC., hereinafter private Defendants, for any increases in rentals attributable to the excess of the sum of the cost of reasonable and comparable property taxes and utilities over the initial operating expense level provided that such payments shall not reduce the rent for any unit below twenty-five to thirty (25-30%) of Plaintiffs' and of the class they represent, "adjuster family income," and that such payments shall be made retroactive to February 18, 1975.

purposes of the National Housing Act goal of a decent home and suitable living environment for every American family; to comply with their own duly adopted rules and regulations which provide that rent increase requests shall be approved only for "bona" and "demonstrated" increases; to consider alternative

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the lower income rents and character of the project; and to consider in the future alternative sources of funds for MEYLER PARK APARTMENTS, especially at the time when requests for rent increases

the federal Defendants shall immediately pay to the private Defendants an amount equal to the rental increase of twelve dollars (\$12.00) per month per Plaintiff and per each member of Plaintiffs class. The Plaintiffs shall not be obligated to pay any part of this increase until further order of this Court, nor shall any action be instituted against Plaintiffs for the collection of such increase by the private Defendants or federal Defendants

Transmittal Notice 24 which amends the Insured Project Servicing Handbook 4350.1 or from failing to assure in all other ways that the reserve fund accrues at the maximum rate and from making any payments from or depleting in any fashion the reserve fund for putterns other than the implementation of the operating subsidy:

7. Plaintiffs are entitled to costs of this action as against the federal Defendants.

Further ordered:

This Court will retain jurisdiction over the parties herein to insure that this Order is properly effectuated.

DATED: 19 1975

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JUDGEIJ. W. CURTIS United States District Court Central District, California

1/20/76 mored costs in sen of \$ 122.

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MAY 6 - 1976

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HILDA ABRAMS, GRETA JAEGER, MARGARET MC EACHIN, individually, and as representative of a class,

Plaintiffs,

CARLA HILLS, as Secretary of the United States Department of Housing and Urban Development, et al.,

Defendants.

NO. CV 75-3009-JWC

MEMORANDUM OPINION

Plaintiffs, individually and on behalf of all others similarly situated, seek to compel the Secretary of Housing and Urban Development and certain officials thereof (hereinafter HUD) to implement the operating subsidy provisions of Section 226 (f)(3) and (g) of the National Housing Act, as amended by the Housing and Community Development Act of 1974, 12 U.S.C. § 1715z-1(f)(3) and (g).

Jurisdiction is invoked pursuant to 28 U.S.C. § 1361.

See, e.g., Elliott v. Weinburger, No. 74-1611, (9th Cir.

October 1, 1975). On December 19, 1975, this court entered

Findings of Fact, Conclusions of Law and an Order granting
the plaintiffs' motion for summary judgment.

The relevant portions of the Housing Act require that

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HUD "shall" establish an initial operating expense level comprised of utility and property tax expenses incurred by the owner of a federally subsidized housing project. HUD is then "authorized" to pay the housing project owner an operating subsidy for utility and property rax expenses which exceed the initial operating expense level. Additionally, the Housing Act creates a reserve fund to be used by HUD to make the above operating subsidy payments.

If the housing project owner is not paid this operating subsidy, the housing project owner will, cf course, pass the utility and property tax expenses onto the tenants in the form of rent increases. Thus, economically speaking, the housing project owners are rather ambivalent towards the operating subsidy.

The facts of this case are not in dispute. Plaintiffs are all tenants of Meyer Park Apartments, a federally subsidized housing project designed for lower income families. On August 7, 1974, and on July 3, 1975, the owner of Meyer Park Apartments applied to HUD for rental increases which were, in part, necessitated by increased utility and property tax expenses incurred by that owner. Both of the rent increase requests were substantially approved and subsequent requests for operating subsidy payments were made to HUD. However, HUD had neither established an initial operating expense level for the Meyer Park housing project nor would it make any operating subsidy payments to that housing project's owner. Plaintiffs then brought this suit and prevailed on their motion for summary judgment.

The thrust of HUD's arguments on motion for rehearing, which are essentially the same arguments as those made in opposition to plaintiffs' motion for summary judgment, is twofold: (1) that HUD is vested with discretion to implement

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the operating subsidy and (2) that contract authority must be utilized in order that the reserve fund be used to make operating subsidy payments.

In support of its argument that the implementation of the operating subsidy is totally discretionary, HUD contends that by the express language of 12 U.S.C. § 1715z-1(f)(3) HUD is merely "authorized" to make the operating subsidy payments, and thus there is no duty to do so.

After reviewing the legislative history, the Congressional intent and the express statutory language, every court that has considered this argument has expressly rejected it, and this court likewise rejects it. See Ross v. Community Services, Inc., 396 F. Supp. 278 (D. Md. 1975); Harrison v. Hills, No. 75-938 (W.D. Penn. October 1, 1975); Dubose v. Hills, No. 75-303 (D. Conn. December 15, 1975); Parker Square Tenants v. Department of Housing and Urban Development, No. 75-577 (W.D. Mo. January 27, 1976).

HUD's second argument in support of its position that the implementation of the operating subsidy is not mandatory is that HUD has discretion on how to allocate released contract authority among the various federal housing programs and thus is empowered to choose not to expend any released contract authority for the operating subsidy.

Congress has authorized HUD to use contract authority released prior to the enactment of the Housing and Development Act of 1974, 3/ and it is undisputed that such contract authority exists. HUD merely refused to use that released contract authority.

In view of the mandatory nature of 12 U.S.C. § 1715z-1 (f)(3) and the clear unequivocal intent of the Senate Appropriations Committee, 4/ this refusal has previously been held, and is presently held by this court, to be an abuse of

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discretion. See Dubose v. Hills, supra; Parker Square Tenants v. Department of Housing and Urban Development, supra.

Finally, HUD argues that the reserve fund established by 12 U.S.C. § 1715z-1(g) cannot be used to make operating subsidy payments without expending contract authority. I find this argument to be without merit.

The express language of 12 U.S.C. § 1715z-1(g) creates a totally independent source of funds from which the operating subsidy is to be paid. Thus, the reserve fund is not subject to the restrictions applicable to other appropriation subsections contained in 12 U.S.C. § 1715z-1. See Ross v. Community Services, Inc., supra.

Even assuming that the existing contract authority must be utilized in order to make the operating subsidy payments from the reserve fund, HUD's refusal to use the existing contract authority is an abuse of discretion. See Dubose v. Hills, supra; Parker Square Tenants v. Department of Housing and Urban Development, supra.

I conclude, therefore, that HUD has a ministeral duty to implement the operating subsidy and that HUD's refusal to utilize existing contract authority to do so is an abuse of discretion. Accordingly, HUD's motion for a rehearing is denied.

DATED: May 6, 1976.

JESSE W. CURTIS United States District Judge

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#### FOOTNOTES

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Reference Page 2 12 U.S.C. § 1715z-1(f)(3) provides in pertinent part: "For each project there shall be established an initial operating expense level, which shall be the sum of the cost of utilities and local property taxes payable by the project owner at the time the Secretary determines the property to be fully occupied, taking into account and anticipated customary vacancy rates. At any time subsequent to the establishment of an initial operating expense level, the Secretary is authorized to make, and contract to make, additional assistance payments to the project owner in an amount up to the amount by which the sum of the cost of utilities and local peoperty taxes exceeds the initial operating expense level, . . . "

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Reference Page 2
12 U.S.C. § 1715z-1(g) provides in pertinent part:
"The project owner shall, as required by the
Secretary, accumulate, safeguard, and periodically pay to the Secretary all rental charges
collected in excess of the basic rental charges.
Such excess charges shall be credited to a
reserve fund to be used by the Secretary to make
additional assistance payments as provided in
paragraph (3) of subsection (f) of this section.

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Reference Page 3
In Sen. R. No. 93-1255, 93rd Cong., 2nd Sess. 8 (1974),
accompanying the supplemental appropriation Act, Pub. L.
93-554, the Senate Appropriations Committee stated in Pertinent
part:

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"The Committee wisnes to clarify the intent in the joint explanatory statement of the Committee of Conference on H.R. 15572 with respect to the use of operating cost subsidies for Section 236 projects that the Secretary is authorized to use available contract authority for operating subsidies for existing or new Section 236 projects."

Reference Page 3
Id.

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EXHIBIT J

## UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

GAIL CARBERRY ET AL.

CIVIL ACTION NO. 76-521-F

CARLA HILLS ET AL.

v.

## MEMORANDUM AND ORDER March 8, 1976

FREEDMAN, D.J.

This matter came on for hearing on plaintiffs' motion for preliminary injunction on February 26, 1976. After consideration of the pleadings and affidavits of the parties and of the arguments of counsel, the Court ORDERS that the preliminary injunction be granted and hereinafter enters its findings and conclusions.

Plaintiffs are low income residents of Hampton Gardens, an spartment complex in Northampton, Mass., subsidized under \$236 of the National Housing Act, 12 U.S.C. \$1715z-1. Defendants are the Secretary of Housing and Urban Development ("HUD") and the owners of the apartment complex ("private defendants"). Plaintiffs seek to represent a class of tenants in the project who are similarly situated. The Secretary was not prepared to go forward on the issue of class certification at the time of the hearing. The Court will conditionally certify the class for purposes of this order; the Secretary may reopen this issue at a later time.

The private defendants applied for HUD approval of a rent increase on October 31, 1975, - the increase was granted in November. The higher rents became effective on February 1, 1976. As a result of this increase 126 of 203 tenants at Hampton Gardens are paying in excess of 30% of their adjusted gross incomes for rent.

Section 212 of the Housing and Community Development Act of 1974, 12 U.S.C. §1715z-1 (f)(3), requires HUD to make operating subsidy payments to developers so that rental payments from certain tenants may be lowered when: (1) the "operating expense level," as

defined by the statute, increases beyond an initial level; and

(2) the rental payments exceed 30% of a tenant's adjusted gross income. Both of these conditions have been met in this case, 
and in view of HUD's recalcitrance in complying with the statute, 
a preliminary injunction seems appropriate. The private defendants 
have supplied the necessary information enabling the Court to award 
a specific sum in accordance with the provision of the statute. 
Should HUD find this figure to be in error, it may later be adjusted.

There is a strong likelihood that plaintiffs will prevail on the merits of their case and they have demonstrated that they are being irreparably harmed.

In accordance with the foregoing, the Court ORDERS as follows:

- 1. That defendants Hills and Frye respectively as Secretary and Regional Administrator of HUD pay to the defendant Hampton Associates forthwith the sum of thirty-five hundred (\$3,500) dollars and, until further order of the Court, to pay the sum of seventeen hundred fifty dollars (\$1,750) monthly, commencing April 1, 1976, as an operating subsidy under \$212 of the Housing and Community Development Act of 1974, 12 U.S.C. 51715z-1 (f)(3).
- 2. That defendant Hampton Associates, upon receipt of the payment ordered in paragraph 1 of this order reimburse tenants at Hampton Gardens any amounts paid by them which are shown in column 8 of Exhibit 2 and 2(a) attached to the Affidavit of Carol A. Adams filed with this Court on February 26, 1976 and attached hereto.
- 3. That defendant Hampton Gardens credit against the rent otherwise due from tenants at Hampton Gardens on and after March 1, 1976 the respective amounts shown in column 8 of Exhibits 2 and 2(a) attached to the Affidavit of Carol A. Adams filed with the Court on February 26, 1976 and attached hereto.

Trank H Trudman United States District Judge

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This same conclusion has been reached and relief ordered in several recent cases. See, e.g., Ross v. Community Services, Inc., 396 F. Supp. 278 (D. Md. 1975); Dubose v. Hills, Civil No. H-75-303 (D. Conn. Dec. 15, 1975).

EXHIBIT K

. IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

LILLIAN M. GERTSCH, EVA J. MILLWARD, SHEILA L. NEMELKA, CHERYL K. WARRINGTON, and all persons similarly situated,

Plaintiffs,

v.

CARIA HILL, individually and in her capacity as Secretary of Housing and Urban Development, L. C. Romney, individually and in his capacity as Director, Salt Lake City Office, Department of Housing and Urban Development, and FRANKLIN RICHARDS,

Defendants.

ORDER GRANTING PLAINTIFFS'
AND DEFENDANT RICHARDS'
MOTIONS AND DENYING FEDERAL
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

C 75-513

Filed in United States District Court, District of Utah

Time: MAR 5 19/6

YERL C. RITCHIE

The plaintiffs in the above-entitled case have filed a motion requesting a preliminary injunction and the federal defendants and the individual defendant Richards have each filed a motion requesting partial summary judgment on the operating subsidy issue. All of the parties have filed extensive materials supporting their respective positions. The matter came before the court for oral arguments on the summary judgment issues on February 9, 1976. The court has carefully considered all of the arguments and filed materials and considers itself to be well advised.

In a stipulation approved by all of the parties on

February 13, 1976, and signed by the court on February 17, 1976, it was agreed that the matter would be argued on summary judgment solely on the question of operating subsidies. It was further agreed that, upon making the determination of law, the court could issue appropriate relief under the plaintiffs' preliminary injunction request. The stipulation, at page 4, listed the contested questions of law which the court must now decide:

- A. Whether defendants were required by 12 U.S.C. § 1715z-1 (f) and (g) to establish by February 18, 1975, an "Initial operating expense level" for the Village Apartments North.
- B. Whether defendant Hill is required by 12 U.S.C. § 1715z-1 (f) and (g) to provide operating subsidies to defendant Richards in an amount equal to the increase in the operating expense level of the Village Apartments North attributable to increases in property taxes and utility costs as provided in the statute.
- C. Whether defendant Richards is required to apply to HUD for the operating subsidy as set out in subparagraph B, supra.

The federal defendants have argued that the court does not have jurisdiction to hear this case. The court has considered those arguments and finds them to be without merit. It appears that the plaintiffs have properly plead jurisdiction and the federal defendants have not demonstrated that jurisdiction does not exist. See Ross v. Community Services, Inc., 396 F. Supp. 278 (D. Md. 1975).

This controversy relates to the "operating subsidy" provisions of the 1974 amendments to the National Housing Act.

Those amendments authorize the Secretary of Housing and Urban Development [HUD] to make additional assistance payments to owners of section 236 projects to cover project cost increases due to increases in utility costs and local property taxes. Village Apartments North, operated by the individual defendant Richards, is a section 236 project. HUD recently approved rent increases, to be paid by the tenants, to cover increased operating costs at the Village Apartments North. The 1974 amendments provide that the defendant Secretary is to "establish an initial operating expense level" for such projects, 12 U.S.C.A. § 1715z-1(f)(3) (Supp. 1976). The amendments further require that the initial operating expense level "shall be established by the Secretary not later than 180 days after August 22, 1974." 12 U.S.C.A. § 1715z-1(g) (Supp. 1976). The amendments also establish a reserve fund of excess rentals to be used by the defendant Secretary to make additional operating subsidy payments. 12 U.S.C.A. § 1715z-1(f) (Supp. 1976). The act also provides, with limitations, for the appropriation of funds to carry out the provisions of the amendments. 12 U.S.C.A. § 1715z-1(i) (Supp. 1976). Finally, the amendments state that the "Secretary is authorized to make, and contract to make, additional assistance payments to the project owner" under the operating subsidy program. 12 U.S.C.A. § 1715z-1(f)(3) (Supp. 1976).

The plaintiffs and the individual defendant contend

that the above provisions place mandatory duties on the Secretary. It appears from the arguments that Village Apartments North technically qualify for the operating subsidy but that the defendant Secretary has determined that interest reduction payments under the old low income housing program and the "deep subsidy" provisions of the 1974 amendments take priority. See 12 U.S.C.A. § 1715z-1(f)(2) (Supp. 1976). The Secretary contends that Congress vested discretion in her to determine whether to implement the operating subsidy program and that she properly exercised that discretion by refusing to implement the program. In their arguments, all of the parties trace the legislative history of the 1974 amendments and reach differing conclusions concerning the intent of Congress. The plaintiffs contend that funds are available to implement the program while the federal defendants argue that Congress has not appropriated any funds specifically for the operating subsidy program and that the reserve fund is inadequate to fund the program.

The court is convinced that the primary purpose of the 1974 amendments is to aid section 236 low income housing projects. The funds are to go directly to the project owner but the real purpose of the legislation is to aid the low income tenants. If the rental payments from tenants in existing projects are allowed to increase too much, many tenants may be forced to leave and the success of the individual project may

be jeopardized. It is incumbent upon the Secretary to respond to the Congressional emphasis on fulfilling the purpose of existing projects as well as applying her limited funds to new low income housing. A reasonable construction of the statutes requires that when the government makes a commitment to a project, that project should receive its proper priority. In short, the Secretary would be expected to act in a manner which will enable each properly managed low income housing project to fulfill the purposes Congress had in mind.

The federal defendants place great reliance on the fact that the amendments state that the Secretary is "authorized" to make contracts for operating subsidy payments rather than stating the mandatory phrase "shall" make contracts. It is clear that the wording of the act gives some discretion to the Secretary. It seems certain to the court, however, that the Secretary cannot refuse to exercise her discretion at all by completely refusing to implement the operating subsidy program. Although this court is not bound by the decisions of other federal district courts, it is impressed by the fact that, when faced with this issue, all of the courts cited have rejected the federal defendants' arguments. E.g., Ross v. Community Services, Inc., supra.

The 1974 amendments direct that the Secretary "shall" establish an initial operating expense level for section 236 projects by February 18, 1975. No such initial operating

expense level has been established for the Village Apartments

North. The Secretary should be required to immediately establish

such an expense level.

The National Housing Act does not seem to directly answer the question of whether the owner of a section 236 project must apply for an operating subsidy, and it does not appear that HUD has provided a vehicle for such applications. It would be logical, however, to require the project owner to apply for the benefits. As such, the individual defendant Richards should use a reasonable method and apply for those benefits.

It is the court's opinion that, after the defendant Richards applies for the operating subsidy, HUD has a legal duty to act upon the application. The amendments do give the defendant Secretary some discretion in her administration of the operating subsidy program. But the Secretary, nonetheless, has the duty to the extent of available funds to implement the program. The order of the court should simply be that the Secretary accept the defendant Richards' application for benefits, consider it in good faith, and act upon the request as quickly as possible, providing the relief to which plaintiffs and defendant Richards are entitled.

Relief will be awarded pursuant to the stipulation signed by counsel on February 13, 1976. Discovery concerning the remaining issues may continue and an initial pretrial

conference, to establish a timetable for the remaining matters, will be scheduled at the request of the parties.

IT IS HEREBY ORDERED that the federal defendants' motion for summary judgment is denied. The defendant Richards' motion for partial summary judgment and plaintiffs' motion for injunctive relief are granted as herein specified.

IT IS FURTHER ORDERED that the federal defendants immediately establish an initial operating expense level for the Village Apartments North, using February 18, 1975, as the base date.

IT IS FURTHER ORDERED that the individual defendant Richards is required, in a reasonable manner, to apply to HUD requesting benefits under the operating subsidy program.

IT IS FURTHER ORDERED that the federal defendants act upon the application filed by the defendant Richards in good faith and as quickly as possible. Upon determining that the statutory requirements for the operating subsidy program have been met, the Secretary is directed to make payments from available funds to the defendant Richards, as project owner, to offset the increases in local utility costs and taxes. Such payments are to be computed according to the formula contained in 12 U.S.C.A. § 1715z-1(f)(3) (Supp. 1976).

DATED this \_5 day of March, 1976.

ALDON J. ANDERSON United States District Judge

EXHIBIT L

New Merico (Mr. Domenici), the Senator from Utah (Mr. Gapn), the Senator from Avizona (Mr. GOLDWATER), the Senator from Michigan (Mr. Griffin), the Senator from Oregon (Mr. HATFIELD), the Senator from Nebraska (Mr. HRUSKA), the Senator from Nevada (Mr. LAXALT), the Senator from Idaho (Mr. McClure), the Sene for from Illinois (Mr. PERCY), the Senator from Vermont (Mr. Staffrond), the Senator from Ohio (Mr. Taff), the Senator from Texas (Mr. Tower), and the Senator from Connecticut (Mr. WEICKER) are necessarily ab-

I further announce that the Senator from New York (Mr. Buckley) is absent due to illness.

I further announce that if present and voting, the Senator from Ohio (Mr TAFT), and the Senator from Oregon (Mr. HATFIELD) would each vote "yea."

The result was announced-yeas 43, nays 18, as follows:

#### [Rollegtt Vote

[10011	can tote No. 3	48 Leg.1
	YEAS-43	
Bartlett Bealt Bellmon Benteen Biden Bumpers Byrd, Harry F., Jr. Church Cranston Dole Fastland Fannin Fong Glenn	Hausen Hart, Philip A. Haskell Hathaway Helms Hollings Huddleston Javits Magnuson Mansfield Mathias McGee McGovern Moss Muskio	Nelson Numn Packwood Pearson Proxmire Randolph Roth Scott, Hugh Scott, William L. Sparkman Stevenson Thurmond Young

	14V 52-11	8
Abourezk Allen Byrd, Robert Cannon Clark Durkin	Ford Gravel t C. Jackson Kennedy McIntyre Metcalf	Morgan Pastore Pell Ribicoff Schweiker Stone

	NOT VOTING	-39
Paker Hayh Frock Brooke Buckley Durdick Case Chilos Culver Curtis Domenici Engleton	Goldwater Griffin Hart, Gary Hartke Hatfield Hruska Humphrey Inouye Johnston Lexalt Leahy	McClure Mondale Montoya Percy Stafford Stennis Symington Taft Talmadge Tower Tunney
Garn	Long McClellan	Weicker

So the motion to lay on the table was arreed to

Mr. PROXMIRE. Mr. President, move to reconsider the vote by which the motion was agreed to.

Mr. HATHAWAY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

#### UP AMENDMENT NO. 117

Mr. JAVITS. Mr. President, I send an amendment to the desk and ask that it be immediately considered.

The PRESIDING OFFICER (Mr. HAS-RELL). The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from New York (Mr. JAVERS) proposes unprinted amendment numbered

#### NEW COMMUNITIES

For necessary expenses under section 502 (a) of the Housing Act of 1948 (12 U.S.C. 1701(c), \$4,300,000.

Mr. JAVITS, Mr. President, I ask unanimous consent that I may yield to the Senator from Alabama (Mr. Spark-MAN) for the purpose of presenting an amendment and, as soon as he has completed with his amendment or amendments, I may regain the floor.

The PRESIDING OFFICER. Without objection, it is so ordered.

Without objection, the amendment by Mr. Sparkman will be in order.

#### UP AMENDMENT NO. 118

Mr. SPAREMAN. Mr. President, I send an amendment to the desk and ask for its immediate consideration.
The PRESIDING OFF

OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows

The Senator from Alabama (Mr. MAN) proposes an unprinted amendment numbered 118: On page 5, line 19, strike all after "\$2,975,000,000", through line 24.

Mr. SPARKMAN, Mr. President, this amendment would delete the provision of the committee bill authorizing excess rental charges credited to HUD under section 236(g) of the National Housing Act to be available for use in other programs.

Mr. President, I believe this provision should be deleted for the following reasons'

First, the Housing Act of 1974 specifically authorized that section 236 funds returned to HUD as excess charges should be used to assist section 236 projects which face financial difficulties, because of increased taxes and utility costs. HUD has failed to carry out this provision despite the specific legislative authority conferred 2 years ago, despite the fact that almost \$25 million in excess charges have been returned to HUD, and despite the fact that many projects face finan-cial difficulties and a number have sought remedy under the 1974 provision.

Second, the General Accounting Office has informed HUD that the accumulated section 236 funds are covered by the Impoundment Control Act, and that, in the absence of a recision approval by the Congress, these funds must be obligated in accordance with the provisions of the 1974 act. HUD has failed to obligate the funds. I am informed that the GAO is now considering legal action in order to require HUD to follow the requirements of the Impoundment Control Act

Several courts have already stated, in cases brought by owners of troubled projects that HUD is required to utilize the returned funds. There are at the present time several judgments against HUD in cases involving more than 20 projects. HUD, however persists in litt-gating rather than in chligating the funds authorized under section 236(g).

Finally, I believe that the provision under discussion is more properly a matter of legislative authorization under the jurisdiction of the Committee on Banking, Housing and Urban Affairs than an appropriations issue, since it would significantly change an authorized liousing program.

In light of the principles and facts I have outlined I believe the manager of the bill should accept this amendment.

I express the hope that the chairman will accept this omendment and, at least, take it to conference where it can be worked out.

Mr. PROXMIRE. May I say to the distinguished Senator from Alabama who, incidentally, is the chairman of the Housing Subcommittee and who was chairn. of the Banking Committee, of course, for many years, that I am happy to accept the amendment. I think it is a very good amendment. It is most im-portant that we do our very beat to keep the section 236 tax and utility subsidy program going. It is a good program. It is for low-income people.

All we are asking, as I understand it is that this money be kept in the program and not distributed elsewhere.

Mr. SPARKMAN. That is what we have provided in the law.

Mr. PROXIME. It certainly is. So I am happy to support the amendment of

the Senator frem Alabama.
Mr. SPARKMAN. I thank the Senator from Wisconsin and I thank the Senator from Maryland.

Mr. MATHIAS. The Senator is exactly right. I am happy to join with the Senator from Alabama and the Senator from Wisconsin.

Mr. SPARKMAN. I thank the Senator

from New York for yielding.
The PRESIDING OFFICER. Do the Senators yield back their time?

Mr. PROXMIRE. I yield back the remainder of my time.

Mr. SPARKMAN. I yield back my time. The PRESIDING OFFICER. The ques tion is on agreeing to the amendment of the Senator from Alabama.

The amendment was agreed to

#### UP AMENDMENT NO. 117

The PRESIDING OFFICER. The Senator from New York.

Mr. JAVITS. Mr. President, the amendment which I proposed would add some \$4 million to the general authority of the Secretary of HUD to deal with the problems of the programs under the Secretary's authority because we find no other place in the bill where it can be put without it being subject to a point of order, and it can be put in here as the appropriation authority is open. I do it for the purpose of raising this particular question which involves a very serious emergency in my own State.

It involves the problems of a community call the Gananda new compannity. and arises under the New Communities Act which we have passed and which to being administered in respect to 13 new communities, of which 7 are having very serious problems. There are two in Minnesota, Cedar Riverside, and Jonathan; there is one in Illinois, Park Forest South; one in Ohio, New Fields, and one in Texas. Flower Mound, and two in New York, Gananda, which is the one immediately at issue, and Riverton, both of which are having problems. That is out of 13 new communities in the country established under this new law

Now, the reason for the new law was the desire, in a demographic sense, to reduce the impact of heavy populations on our central and older cities, and an order to develop new centers, new city centers, in different parts of the country

EXHIBIT M

1977 budget estimates, and the House and Senate bills for 1977 follows:

New budget (obligational)

Conference agreement compared with: 

(obligational) authority, fiscal year 1977\_\_\_\_ House bill, fiscal year 1077 Senate bill, fiscal year

+ 138, 547, 000 +15,762,000

-614, 054, 413

<sup>1</sup>Includes \$90,059,000 advance appropriation for fiscal year 1977 and \$561,000,000 advance appropriation for fiscal years 1978 and

<sup>2</sup> Includes \$76,000,000 of budget estimates not considered by the House, contained in Sen. Doc. 94-203 and 94-206, and excludes \$255,000,000 of budget estimates ocnsidered by the House reduced by Sen. Doc. 94-196. Includes \$15,421,779 advance appropria-

tion for fiscal year 1978.

JOHN J. MCFALL, TOM STEED. EDWARD I. KOCH, BILL ALEXANDER, ROBERT DUNCAN, GEORGE H. MAHON, SILVIO O. CONTE, JACK EDWARDS, ELFORD A CEDERRERG

BIRCH BAYH,

Managers on the Part of the House.

JOHN L. MCCLELLAN, ROBERT O. BYRD, JOHN C. STENNIS, WARREN G. MAGNUSON, JOHN O. PASTORE, THOMAS F. EAGLETON, CLIFFORD P. CASE, MILTON R. YOUNG, TED STEVENS, CHARLES MCC. MATHIAS, Jr., RICHARD S. SCHWEIKER Managers on the Part of the Senate.

#### CONFERENCE REPORT ON H.R. 14233

Mr. BOLAND submitted the following conference report and statement on the bill (H.R. 14233) "making appropriations for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes:

CONFERENCE REPORT (H. REPT. No. 94-1362)

The committee of conference on the disagreeing votes of the two, Houses on the amendments of the Senate to the bill (H.R. amendments of the senate to the bill (11.16.) 14233) "making appropriations for the Department of Housing and Urban Development, and for sundry independent executive agencies, boards, bureaus, commissions, corporations, and offices for the fiscal year ending September 30, 1977, and for other purposes," having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as

That the Senate recede from its amendments numbered 3, 13, 20, 23, 25, 38, 40, 41, 42 and 43.

That the House recede from its disagreement to the amendments of the Senate numbered 4, 6, 8, 15, 16, 17, 19, 21, 22, 24, 30, 33, 34, and 39, and agree to the same.

Amendment numbered 5: That the House recede from its disagreement to the amendment of the Senate numbered 5, and to the same with an amendment, as follows: Restore the matter stricken by said amend-ment, amended to read as follows:

#### "HOUSING COUNSELING ASSISTANCE

"For contracts, grants, and other assistance, not otherwise provided for, of providing counseling and advice to tenants and homeowners—both current and prospective with respect to property maintenance, finan-cial management, and such other matters as may be appropriate to assist them in improving their housing conditions and meeting the responsibilities of tenancy or homeownership, including provisions for training and for support of voluntary agencies and services as authorized by section 100(a) (1) (iii) and section 106(a) (2) of the Housing and Urban Development Act of 1968, as amended, \$3,000,000."

And the Senate agree to the same,

Amendment numbered 9: That the House recede from its disagreement to the amendment of the Senate numbered 0, and agree to the same with an amendment, as follows: In lieu of the sum proposed by said amendment insert "\$62,500,000"; and the Senate agree to the same.

Amendment numbered 10: That the House recede from its disagreement to the amend-ment of the Senate numbered 16, and agree to the same with an amendment, as follows: In lieu of the sum proposed by said amend-ment insert "\$50,000,000"; and the Senate agree to the same

Amendment numbered 11: That the House recede from its disagreement to the amendment of the Senate numbered 11, and agree to the same with an amendment, as follows: In lieu of the sum proposed by said amendment insert "\$55,000,000"; and the Senate agree to the same.

Amendment numbered 12: That the House recede from its disagreement to the amend-ment of the Senate numbered 12, and agree to the same with an amendment, as follows: In lieu of the sum proposed by said amendment insert "\$419,000,000"; and the Senate

agree to the same. Amendment numbered 14: That the House recede from its disagreement to the amendment of the Senate numbered 14, and agree to the same with an amendment, as follows: In lieu of the sum proposed by said amendment insert "\$39,000,000"; and the Senate

agree to the same.

Amendment numbered 18: That the House recede from its disagreement to the amendment of the Senate numbered 18, and agree to the same with an amendment, as follows: In lieu of the sum proposed by said amend-ment insert "\$376,844,000"; and the Senate agree to the same.

Amendment numbered 26: That the House recode from its disagreement to the amendment, of the Senate numbered 26, and agree to the same with an amendment, as follows: in lieu of the sum proposed by said amendment insert \$813,000,000"; and the Senate agree to the same.

Amendment numbered 27: That the House

recede from its disagreement to the amend-ment of the Senate numbered 27, and agree the same with an amendment, as follow In lieu of the sum proposed by said amendment insert "\$710,000,000"; and the Senate agree to the same.

Amendment numbered 36: That the House recede from its disagreement to the emendment of the Senate numbered 36, and agree ment of the senate numbered 38, and agree to the same with an amendment, as follows: In lieu of the matter stricken and inserted by said amendment insert the following: "Provided, That \$5,800,000 shall be available for construction of a research and education facility at Delles, Texas; \$19,000,000 for contraction of inclities on government-oviland for a TAPCLET data processing cent \$534,000 for design of nursing home of facilities at Wilkes-Barre, Ponnsylvan \$500,000 for design of a new blind rehabitation center and eye, ext, note and threclinic at Birmingham, Alebama; \$3,500,000 for the design of a clinical and ambulate care addition and repostation of existing care addition and renovation of existi areas at the Oklahoma City, Oklahoma, Verans Administration Hospital; and \$460,0 for the design of a new clinical building the Mountain Home Administration Hespital"; and the Seni agree to the same.

The committee of conference report disagreement amendments numbered 1, 2, 28, 29, 31, 32, 35, and 37.

EDWARD P. BOLAND. JOE L. EVINS, GEORGE E. SHIPLEY, J. ECWARD ROUSH, EOD TRAXLER, MAR DAUCUS, LOUIS STORES. YVONNE BRATHWAITE BURKE, George Malion, BURT L. TALCOTT, JOSEPH M. McDADE, C. W. BILL YOUNG, ELFORD A. CECERPER Managers on the Part of the House. WILIJAM PROZEMER,

John O. Pastore, John C. Stennis, Mike Manspield, BIRCH BAYH, LAWTON CHILES, J. BEHNETT JOHNSTON, WALTER D. HUDDLESTON, JOHN L. MCCLELLAN, FRANK. E. MOSS, CHARLES MCC. MATHIAS, CLIFFORD P. CASE, HIRAM L. FONG, EDWARD W. BROOKE, HENRY BELLMON, MILTON R. YOUNG, Managers on the Part of the Senate.

#### JOINT EXPLANATORY STATELIENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the Hen and the Senate at the conference on the dy agreeing votes of the two Houses on the amendments of the Benate to the bill (ELI 14263) making appropriations for the Dipartment of Housing and Urban Develop ment, and for sundry independent executive agencies, boards, bureaus, commissions, coporations, and offices for the fiscal year ending September 30, 1977, and for other put poses, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon b the managers and recommended in the ac companying report:

#### TITLE I-DEPARTMENT OF HOUSIN AND USEAN DEVELOPMENT

Amendment No. 1: Reported in technica disagreement. The managers on the part of the House will offer a motion to recede the concur in the amendment of the Senate will an amendment as follows:

The additional amount of contracts for en-The additional amount of contracts for en-mual contributions, That otherwise provided for, as authorized by section 5 of the United States Housing Act of 1937, as amended (42 U.S.O. 1437c), entered into efter September 30, 1976, shall not exceed \$675,000,000 including not more than \$35,000,000 for the med-ernization of existing low-income housing projects, which amounts shall be in addition to balances of authorization heretofore made available for such contracts: Provided, That the total new budget authority obligated under such contracts entered into after Sep-tember 80, 1976, shall not exceed \$14.870.400.

000, which amount shall not include budget authority obligated under balances of authorization heretofore made available: Provided further. That of the total herein provided, excluding funds for modernization, not more than \$120.000,000 shall be used only for contracts for any significant provided for special provided for more than \$120,000,000 shall be used only for contracts for annual contributions to assist in financing the development or acquisition of low-income housing projects to be owned by public housing agencies other than under section 8 of the above Act: Provided further. That of the amount set forth in the second proviso, not more than \$85,000,000 shall be used only for projects on which construction or substantial rehabilitation is commenced after the effective date of this Act except in the case of amendments to existing contracts: Provided further. That of the amount set forth in the second proviso, not less than 15 per centum shall be used only with respect to new construction in non-metropolitan areas.

The managers on the part of the Senate will offer a motion to concur it the amendment of the House to the amendment of the

Senate

The committee of conference agrees that the \$85,000,000 carmarked for new public housing construction includes the 15 per centum for projects in non-metropolitan areas, and the anticipated \$17,000,000 for Indian housing and \$8,000,000 for amendments to public housing annual contributions contracts.

The committee of conference also expects that the maximum of \$12,000,000 carmarked for public housing, including a maximum of \$85,000,000 for new or substantially rehabilitated construction, and the maximum of \$35,000,000 for modernization of public housing, will all be fully utilized by the Denorth ing will all be fully utilized by the Depart-

Finally, it is agreed that the 15 per centum set forth for new public housing construction in non-metropolitan areas shall be exclusive of any contract authority used for Indian

Amendment No. 2: Reported in technical disagreement. The managers on the part of the House will offer a motion to recede and concur in the amendment of the Senate with an amendment as follows:

Provided further, That the Secretary manborrow from the Secretary of the Treasury in such amounts as are necessary to provide the loans authorized herein.

The managers on the part of the Senate will offer a motion to concur in the amendment of the House to the amendment of the

Amendment No. 3: Restores language pro-posed by the House and stricken by the Sen-ate making available any excess rental charges under section 236(g) of the National Housing Act to liquidate contract obligations for a number of programs under the housing payments account

payments account.

The committee of conference is agreed that this action shall not prejudice any suit now or hereafter before the courts in this area.

The conferees note that HUD has testified that, in calculating the need for \$575,600,000 in public housing operating subsidies, the hereaftment has pressured implementation. in public housing operating subsidies, the Department has presumed implementation of a revised perform nee funding formula developed by the Urban Institute. The conferees expect that the Department will emplement the revised formula retroactive to April 1 1000 so that public housing author authors. April 1, 1976, so that public housing author-ities whose fiscal years began on April 1, 1976.

tiles whose fiscal years began on April 1, 1976, will be able to operate under the revised formula during this fiscal year.

Amendment No. 4: Deletes language proposed by the House and inserts language as proposed by the Senate making technical changes in the wording of the Federal Housing Administration Fund appropriation.

Amendment No. 5: Restores language pro-posed by the House and stricken by the Sen-ate for housing counseling assistance and

appropriates \$3,000,000 instead of \$5,000,000

as proposed by the House.

Amendment No. 6: Appropriates \$3,148,000,000 for community development grants
as proposed by the Senate, instead of \$3,048,-

as proposed by the Senate, instead of co., o.o., provide a minimum of \$100,000,000 in community de elopment grants for small com-munities in standard metropolitan statistical

aunitides in standard interoperation states.

Amendment No. 8: Deletes language proposed by the House carmarking \$100,000.000 in community development grants for small communities, in standard metropolitan statistical areas as proposed by the Senate.

Amendment No. 9: Appropriates \$62,500,-000 for comprehensive planning grants, instead of \$50,000,000 as proposed by the House and \$75,000,000 as proposed by the Senate.

The commutate of conference understands that the Department has too narrowly restricted the use of community development funds for planning activities. The conferees direct that these funds be made available for comprehensive planning in accordance with Section 105(a) (12) of the Housing and Community Development Act of 1974.

Amendment No. 10: Appropriates \$50,000,-000 for the rehabilitation loan fund, instead of \$25,000,000 as proposed by the House and

\$75,000,000 as proposed by the House and \$75,000,000 as proposed by the Senate.

Ameudment No. 11: Appropriates \$55,000,000 for research and technology, instead of \$52,000,000 as proposed by the House and \$60,000,000 as proposed by the Senate.

The committee of conference agrees that within the funds provided, not less than \$4,500,000 shall be allocated to the Urban Relayestment Task Force research program.

Amendment No. 12: Appropriates \$419,-000,000 for salaries and expenses of the Department, instead of \$417,000,000 as proposed by the House and \$421,000,000 as proposed by the Senate. The committee of conference agrees that the amount provided will fund 15.570 positions distributed as follows:

Housing Programs	8.278
Crovernment National Mortgage Asso-	
ciation	39
Community Planning and Develop-	
ment	1,483
New Communities	80
Federal Insurance Administration	298
Interstate Land Sales	115
Policy Development and Research	182
Fair Housing and Equal Opportunity	404
Federal Disaster Administration	168
Departmental Management	156
Office of General Counsel	200
Field Legal Services	315
Oluce of Inspector General	491
Administration and Staff Services	1.617
Field Direction	555
Field Administration	1, 129
	1,120
Total	15, 570

Amendment No. 13; Deletes language proposed by the Senate appropriating \$4,300,000 to be used at the discretion of the Seretary of Housing and Urban Development for the foreclosure of the new community in Gananda, New York

TITLE II-INDEPENDENT AGENCIES

Consumer Product Safety Commission Amendment No. 14: Appropriates \$39,000 -000 for salaries and expenses, instead of \$41,-100,000 as proposed by the House and \$37,-000,000 as proposed by the Senate.

Environmental Protection Agency

Amendment No. 15: Appropriates \$259,-900,000 for research and development as proposed by the Senate, instead \$265,000,000 as proposed by the House. The committee of conference is agreed that any additional positions required for the Chesapcake Bay study must be released by the Office of Management and Budget and not absorbed by the agency.

Amendment No. 16: Inserts language limiting availability of research and development funds until September 30, 1978. as proposed by the Senate, instead of until expended as proposed by the House.

Amendment No. 17: Inserts language limiting availability of abatement and control funds until September 30, 1978, as proposed by the Senate instead of tentions.

posed by the Senate, instead of until ex-

pended as proposed by the House.

Amendment No. 18: Appropriates \$376,-844,000 for abatement and control, justead of \$398,044,000 as proposed by the House and \$371,844,000 as proposed by the Senate. The committee of conference is an agreement with the recommendations contained in the report of the Senate except that \$15,000,000 shall be available for the "Clean Lakes" program as proposed by the House, instead of \$10,000,000 as proposed by the S nate.

The committee of conference L also agreed

that \$1,000,000 shall be made available for providing grants to State associations of rural water districts for the purpose of establishing training and technical assistance programs to assist rural water systems in complying with the provisions of the Section in complying with the provisions of the Safe Drinking Water Act and the reprogramming funds for such purposes as proposed in the Senate report

Amendment No. 19: Appropriates \$5,000,-000 for scientific activities overseas as proposed by the Senate, instead of \$6,000,000 as proposed by the House.

Amendment No. 20: Restores language pro-posed by the House and stricken by the Senate limiting 1976, transition period, and 1977 funds for areawide planning grants authorized by section 208 of the Federal Water Pollution Control Act to 75 percent of project costs.

The committee of conference agrees that the 75 percent limitation on the Federal contribution authorized by Section 208 of the Federal Water Pollution Control Act is not intended to apply to any funds that may be made available by court actions.

Council on Environmental Quality

Amendment No. 21: Appropriates \$2,800,000 for the Council on Environmental Quality and Office of Environmental Quality as proposed by the Senate, instead of \$2,917,000 as proposed by the House.

Office of Science and Technology Policy Amendment No. 22: Appropriates \$2,300,000 for salaries and expenses as proposed by the

The committee of conference is agreed that none of the funds provided shall be used to fund major contracts for the pursuance of a 2-year survey of the overall Federal science and technology effort in the absence of additional information.

Office of Consumer Affairs

Amendment No. 23: Appropriates \$1,581,-000 for the Office of Consumer Affairs as proposed by the House, instead of \$1,645,000 as proposed by the Senate.

National Aeronautics and Space Administration

Amendment No. 24: Appropriates \$2,761,-425,000 for research and development as proposed by the Senate, instead of \$2,767,425,-000 as proposed by the House.

The committee of conference accepts the concept that terrestrial energy development should be responsibility of the Energy Re-search and Development Administration. However, it also believes that work on the However, it also believes that work on the solar satellite segment of a solar satellite power generation system should be pursued by the National Aeronautics and Space Administration. Therefore, the committee of EXHIBIT N

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No. 76-1603

Myrna Underwood, et al., ... Appellees

V.

Corle Mills, individually and in her cifficial capacity as Secretary of the United States Department of Mousing and Urban Development, at al., Appellants

No. 76-1650

Myrna Underwood, et al.,
Appellants

V.

Carla A. Hills, individually and in her official capacity as Secretary of the United States Department of Housing and Urban Development, et al

BEFORE: Robb and Wilkey, Circuit Judges

September Term, 19 75 Civil Action No. 76-469

Civil Action 476-489

United States Court of Appeals
for the District of Columbia Circuit,

FILED AUG 3 1 1976

GEORGE A. FISHER

### CRDER

On consideration of defendance-appellants motion for stay pending appeal, of plaintiffs-appellants motion for injunction pending appeal, of the responses thereto, and of defendants-appellants supplemental memorandum discussing new legislation, it is

ORDERED by the Court that the defendents-appellants' motion for stay is denied. The district court order here under review was entered prior to ensetment of Public Law 94-378 on August 9, 1976. In our view the district court's order does not preclude the Secretary from using the reserve fund to fund programs other than the operating subsidy program, 12 U.S.C. § 1715x71(2)(3), to the outent such other funding is authorized in Public Law 94-378.

IT IS FURTHER CROERED by the Court that the plaintiffsappellants' motion for injunction is dealed. Under the district
court order the Secretary may implement Transmittal No. 24 retroactively to reimburse a project owner only to the extent the
owner's net-rental income from the project for the period in
question was less than the basic rental charges for that period.

# Wintied States Unlit at Amarents

No. 76-1603 and 76-1650

September Term, 1975

Page 2

IT IS FURTHER ORDERED by the Court, sus sponte, that the parties will ad one strictly to the requirements of Rule 31(a) of the Federal Rules of Appellate Procedure and the case will be heard after completion of briefing as soon as the business of the Court permits.

IT IS FURTHER ORDERED by the Court, sua sponte, that Nos. 76-1603, 76-1650 and Nos. 76-1641, 76-1642 will be heard by the same panel on the same day.

Per Cumian

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EXHIBIT O

Come Press Appellate Section, Civil Division Room 3043 U. S. DEPARTMENT OF SUBTICE Washington, D. C. 20530 September 20, 1976 Telephone: REL:MH:REK:lac 202-739-3389 145-17-1145 Gerald Goldman, Esquire Hughes, Hubbard & Reed 1660 L Street, N.W. Washington, D.C. 20036 Battles Farm Company, et al. v. Hills, et al. (C.A.D.C., Nos. 76-1541 and 75-1542). Dear Mr. Goldman: This is in response to your letter of Eeptember 10, 1975. in which you requested answers to questions concerning HUD's intended use of the reserve fund pursuant to P.L. 94-373. HUD has advised us that it does intend to use the reserve fund to pay non-operating subsidies referred to in P.L. 94-376. On October 1, 1975, the amounts presently credited to the Section 236(7) reserve fund will be credited to the housing payments account for payment on contracts as outlined in P.L. 94-376. The rate at which the amounts so credited will be expended is impossible to determine, since they will have no separate identity once they are commingled with amounts already appropriated to the housing payments account. To answer your final question, i.e., at what rate will HUD make operating subsidy payments from the reserve fund, no operating subsidy payments will be made from the reserve fund, since there will be no money in the reserve fund once it is transferred to the housing payments account. All payments for operating subsidies will be made out of the housing payments account pursuent to the use of the Secretary's available contract authority for the Section 236 program. Yours very truly, REX E. LEE Assistant Attorney General Civil Division Morton Hollander Chief, Appellate Section

EXHIBIT P

**O** 

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1603

Myrna Underwood, et al., Appellees

V.

Carla Hills, individually and in her official capacity as Secretary of the United States Department of Housing and Urban Development, et al.,

Appellants

No. 76-1650

Myrna Underwood, et al., Appellants

v.

Carla A. Hills, individually and in her official capacity as Secretary of the United States Department of Housing and Urban Development, et al September Term, 19 76

Civil Action Court of Appeals for the District of Calembia Circuit

FILED SEP 3 0 1976

GEORGE A. FISHER Civil Action #76-469

BEFORE: Wright and Tamm, Circuit Judges

#### ORDER

On consideration of appellants' motion for injunction pending appeal, and appellants' motion for clarification of order of August 31, 1976, in order solely to afford this Court an opportunity more fully to consider the matter, and until further order of this Court, it is

ORDERED by the Court that defendant-appellants are precluded from allocating monies in the reserve fund to fund programs other than the operating subsidy program, 12 U.S.C. § 1715z-1(f)(3), until the assistance payments as provided in subsections (3) and (4) of the District Court's order of June 8, 1976 have been made. Defendant-appellants are not precluded by this order from making refund payments, to the extent authorized by the District Court order of June 8, 1976, and the order of this Court dated August 31, 1976.

Per Curiam